SUBJECT INDEX.

Cases Cited.

Text Books Cited.

Index Statutes.

In The

United States Supreme Court

October Term, 1919.

No. 153.

THE GRAND TRUNK WESTERN RAILWAY COMPANY,
Appellant,

v.

THE UNITED STATES,
Appellee.

APPELLANT'S BRIEF.

Nature of the Action.

The claimant, a railroad corporation organized and doing business under the laws of the state of Michigan, brought this action September 8th, 1913, in the Court of Claims, to recover $52,566.87, which it claims was the balance due it for carrying mail from November 1, 1912, to June 30, 1913, over postal route 137,039, from Port Huron, Michigan, to Chicago, Illinois, under its mail contract with the Government.

On December 28, 1912, the Postmaster General modified and approved an order of the Second Assistant Postmaster General, issued November 27, 1912, which restated and reduced the amount to which the plaintiff company, by orders of January, 1901; August, 1903; October, 1907, and October, 1911, had been stated to be entitled for transportation of mails, so as to cause the same to provide pay between Port Huron railroad station and Flint, Michigan, on a land grant basis.

The Postmaster General reduced the pay of the plaintiff company for the period from November 1, 1912, to June 30, 1915, and deducted $50,369.70 for overpayment from October 1, 1900, to October 31, 1912, from the pay of the plaintiff company for the year ending June 30, 1913. The additional amount of $2,007.17, included in the amount for which this action is brought, is the amount deducted from the compensation of plaintiff, from November 1, 1912, to June 30, 1913, because of a reduction in the rate to a land grant basis.

The cause was tried in the Court of Claims, on April 25 and 26, 1918, and on May 27, 1918, the Court of Claims filed its findings of fact and conclusions of law, and on that date judgment of the Court was entered, dismissing the petition of plaintiff.

On June 18, 1918, plaintiff filed its application for an appeal, which was duly allowed June 24, 1918.

STATEMENT OF THE CASE.

The essential facts set forth in the several findings (R., 14) may be stated as follows:

I.

Plaintiff is a Michigan railroad corporation and for a number of years has been engaged in general railroad business, carrying mail for the United States and operating the line of road between Port Huron and Flint in the State of Michigan.

II.

Sections 1, 2, 3, 4 and 5 of the Act of Congress, approved June 3, 1856 (11 Stat. L., 21), read as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled: That there be, and hereby is, granted to the State of Michigan, to aid in the construction of railroads from Little Bay de Noquet to Marquette, and thence to Ontonagon, and from the last two named places to the Wisconsin State line; and also from Amboy, by Hillsdale and Lansing, and from Grand Rapids to some point on or near Traverse Bay; also from Grand Haven and Pere Marquette to Flint, and thence to Port Huron, every alternate section of land designated by odd numbers; for six sections in width on each side of each of said roads; but in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of

the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise apportioned, or to which the right of preemption has attached as aforesaid, which lands (thus selected in lieu of those sold, and to which preemption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and apportioned as aforesaid) shall be held by the State of Michigan for the use and purpose aforesaid: Provided, that the lands to be so located shall in no case be further than fifteen miles from the lines of said roads and selected for and on account of each of said roads: Provided further, that the lands hereby granted shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: And provided further, that any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are, hereby reserved to the United States from the operations of this Act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case, the right of way only shall be granted, subject to the approval of the President of the United States.

"Sec. 2. And be it further enacted, that the sections and parts of sections of land which, by such grant, shall remain to the United States within six miles on each side of each of said roads shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to private entry until the same have been first offered at public sale at the increased price.

"Sec. 3. And be it further enacted, that the said lands hereby granted to the said State shall be subject to the disposal of the legislature thereof for the purposes aforesaid and no other; and the said railroads shall be and remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

"Sec. 4. And be it further enacted, that the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be sold; and so from time to time until said roads are completed; and if any of said roads is not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States.

"Sec. 5. And be it further enacted, that the United States mail shall be transported over said roads, under the direction of the Postoffice Department, at such price as Congress may by law direct: Provided, that until such price is fixed by law, the Postmaster General shall have the power to determine the same."

III.

By the Act of February 14, 1857 (Mich. Laws, No. 126), the Act of Congress, of June 3, 1856, was accepted. Section 1 of the Michigan Act, is as follows:

> "Sec. 1. The people of the State of Michigan enact: That the lands, franchise, rights, powers, and privileges granted to and conferred upon the State of Michigan, by an Act of Congress, entitled, 'An Act making a grant of alternate sections of land to the State of Michigan to aid in the construction of certain railroads in said State and for other purposes,' approved June third (3rd), eighteen hundred and fifty-six (1856), be and the same are hereby accepted with the restrictions and upon the terms and conditions contained in said Act of Congress."

Section 2 of the Michigan Act, so far as it relates to this case, is as follows:

> "So much of the aforesaid lands, franchises, rights, powers, and privileges as are or may be granted and conferred, in pursuance of said Act of Congress, to aid in the construction of a railroad * * * from Grand Haven to Flint, and thence to Port Huron, are hereby vested fully and completely in the Detroit & Milwaukee Railway Company, and in the Port Huron & Milwaukee Railway Company, in the manner following, to-wit: So much of said lands as pertain or attach to said route from Grand Haven to Owosso, in the County of Shiawassee, are hereby vested fully and completely in the Detroit & Milwaukee Railway Company, and so much of said lands as pertain or attach to said route from Owosso to Flint, and thence to Port Huron, are hereby vested fully and completely in the Port Huron & Milwaukee Railway Company, to aid in the construction of the roads of said companies respectively; in like manner all the lands, franchises, rights, powers and privileges which are,

or may be granted and conferred, in pursuance of said Act of Congress to aid in the construction of a railroad from Pere Marquette to Flint, and thence to Port Huron, are hereby vested fully and completely in the Flint & Pere Marquette Railway Company, and in the Port Huron & Milwaukee Railway Company, according to the provisions of the Act of Congress relating thereto and the direction of the board of control hereby appointed; * * * All and each of the several railroad companies mentioned in this section shall be subject to all the conditional restrictions and obligations imposed upon them by this Act as hereinafter provided."

Sections 3, 4, 5 and 6 of the Michigan Act are as follows:

"Sec. 3. The lands, franchises, rights, powers, and privileges hereby conferred upon and vested in said railroad companies, or either of them, shall be exclusively applied in the construction of their respective lines of railroads, as above designated, and said lands shall be applied to no other purposes whatsoever; and each and every one of said railroads, when completed, shall, in all respects, and in all its parts, be a first-class railroad; and the rail thereof shall be the 'T' or continuous rail.

"Sec. 4. Said railroads shall be and forever remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States; and the United States mail shall be transported over said railroads, under the direction of the Postoffice Department, at such price as Congress may by law direct: Provided, that until such is fixed by law, the Postmaster General shall have the power to determine the same.

"Sec. 5. Each and every one of said railroad companies is required by a vote of a majority of the directors thereof, to accept the lands, franchises, rights, powers, and privileges hereinbefore conferred; which

acceptance shall be embodied in a written instrument, signed by the president, and attested by the secretary and corporate seal of said company; and in such acceptance each of said companies, shall severally assent and agree to the provisions and requirements of this Act, which acceptance shall be filed in the office of the secretary of State of Michigan, within sixty days after the passage of this Act.

"Sec. 6. It shall be the duty of each of said railroad companies, on or before the first day of December next, to locate the line of its railroad and to make complete maps of said line, and to file copies of such maps in the offices of the governor and secretary of State of Michigan; and it shall be the duty of the governor, after affixing his official signature to the duplicate map of each of said roads, to file them in the department having control of the public lands in the City of Washington; said lines so located shall not be considered absolutely final further than to fix the limits and boundaries within which said lands may be selected, but said company shall have the right to make alterations thereof when necessary to improve said line: Provided, such alteration shall not materially change or alter such road."

So much of Section 8 of that Act as is applicable to this case, reads as follows:

"For the purpose of securing the construction of the aforesaid railroads, within the time limited, and in the manner prescribed in this Act, and for the purpose of properly managing and disposing of the lands appropriated to aid in the construction thereof, the governor of the State of Michigan, together with six commissioners, to be nominated by the governor and confirmed by the Senate, are hereby constituted a board of control of the same, whose duty it shall be to manage and dispose of such lands in aid of the construction of the aforesaid railroads, in the manner in this Act provided, and to do any and all other Acts necessary and proper respecting the construction and

building of said railroads, which shall be prescribed by law;" * * *

Sections 11, 16 and 20, of the Michigan Act, read as follows:

"Sec. 11. Should either of said railroad companies fail to accept said lands on the terms of this Act, within sixty days, or fail to make the survey and maps by the first day of December next, or fail to construct its entire line of road or any part thereof, in the time and manner required, in such case said board of control shall have the power, and it is hereby made their duty, to declare said lands, so far as they have not been sold in good faith, forfeited to the State, and said board of control are hereby required to confer said lands upon some other competent party, under the general regulations and restrictions of this Act.

"Sec. 16. Said railroad companies shall take said grants of land with the conditions imposed, and incumbrances specified in this Act, and shall in no court have any claim or recourse whatever upon the State of Michigan, for a misapplication of said grants, or for any of the incumbrances, or conditions in this Act imposed.

"Sec. 20. In consideration of the grants of land, and other privileges hereby conferred on each of the several railroad companies mentioned and named in Section two of this Act, the said several railroad companies are hereby required, within sixty days from and after the first day of each and every year, to pay into the treasury of this State, as a specific annual tax, one per cent upon the cost of the road and its equipments and appurtenances, of whatever kind, and it shall be lawful for the legislature of this State, in their discretion, after ten years, to impose upon either or each of said railroad companies the payment of a further tax upon the gross or total earnings of such road of not exceeding two per cent; which said above several taxes shall be in lieu of all other

taxes to be imposed within this State; Provided, that the provisions of this Section shall not apply to railroad companies, in the upper peninsula of this State, until aften ten years from the passage of this Act: Provided, also, that the aforesaid additional tax of two per cent shall be imposed upon the Detroit & Milwaukee Railway Company, and the Port Huron & Milwaukee Railway Company, only in proportion to the amount of land which they shall respectively receive in comparison with the quantity of lands received by the other railroad companies, which proportion shall be settled by the board of control."

Section 13 of the Act of Congress, approved July 12, 1876, 19 Stat. L., page 82, Chap. 179, reads as follows:

"Sec. 13. The railroad companies whose railroad was constructed in whole or in part by land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should, by law, direct, shall receive only eighty per centum of the compensation authorized by this Act."

IV.

Within the sixty-day period provided in the Michigan Act of February 14, 1857, the Detroit & Milwaukee Railway Company and the Port Huron & Milwaukee Railway Company each filed with the secretary of state of Michigan, an attempted acceptance of the Act, in which each company severally assented and agreed to the provisions and requirements of the Act, with the exception that each company protested against Section 20 of the Act and refused to assent to the provisions of that section. Acting under Section 11 of the Michigan Act, the Board of Control of Railroads, on August 26, 1857, declared that the public lands were forfeited as to those companies, and reverted to the State of Michigan.

V.

The projected line of the Detroit & Milwaukee Company extended from Owosso, in Shiawassee County, west to Grand Haven, in the State of Michigan.

The Port Huron & Lake Michigan Railroad Company was chartered in 1847, to construct a railroad from Port Huron to some point on Lake Michigan, at or near the mouth of Grand River. The company was authorized, by its original charter, to receive the grant of land in question.

The Port Huron & Milwaukee Railway Company was organized under a special Act of the Michigan legislature, approved February 12, 1855, to construct a line of railroad from Grand Haven to Flint, and then to Port Huron, over practically the same line proposed by the Port Huron & Lake Michigan Railroad Company. The Port Huron & Milwaukee Railway Company surveyed said line of road and purchased and secured title by deed to the greater part of the land on which said proposed road was to be built. December 9, 1857, said company filed in the General Land Office of the Interior Department, a map of definite location of said road, which was approved by that office. A small amount of work was done by the Port Huron & Milwaukee Railway Company on its line of road between Port Huron and Flint. On January 7, 1856, the Port Huron & Milwaukee Railway mortgaged all and singular the railway of said company extending from the St. Clair river, in the town of Port Huron, in the County of St. Clair, State of Michigan, through the counties of St. Clair, Lapeer, Genessee and Shiawassee, to its junction with the Detroit & Milwaukee Railway, in Shiawassee county, and all the right of way and real estate theretofore and thereafter to be acquired in the construction and occupation of said railroad of said company, and all and singular the property of said company, present or future, not enumerated, and the finances, rights and privileges of said company. The mortgage was foreclosed and by mesne conveyances all of said property of the

Port Huron & Milwaukee Railway Company was conveyed to trustees for the Port Huron & Lake Michigan Railroad, on March 12, 1865, and conveyed by said trustees to the Port Huron & Lake Michigan Railroad Company, on July 25, 1873.

On June 3, 1863, the Secretary of the Interior certified to the governor of Michigan, 30,998.76 acres of land, lying west of Flint, for said Detroit & Milwaukee Railway Company. On November 1, 1864, 6,428.68 acres were certified by the Secretary of Interior to the governor of Michigan, for said Port Huron & Milwaukee Railway Company. The lands last mentioned lay to the north and to the south of the railroad afterwards constructed between Port Huron and Flint, and with the exception of 97.40 acres in Shiawassee County, said lands were east of Flint.

The major portion of the work of construction of said line of railroad, between Port Huron and Flint, was done by said Port Huron & Lake Michigan Railroad Company, which commenced laying rails at Port Huron, and thence westerly, in the summer of 1869, and its said railroad was completed and in operation from Port Huron to Imlay City, and then to Lapeer, by the fall of 1870, and from Port Huron to Flint on December 12, 1871. Considerable sums of money were subscribed and paid by individuals and organizations along the line of said route to aid in its construction from Port Huron to Flint. The line above described is the only line of railroad ever built directly connecting Port Huron and Flint. On August 28, 1875, Port Huron & Lake Michigan Railroad Company filed in the office of the Secretary of State a map of the route of said railroad, from Port Huron to Flint, as established by resolution of the Board of Directors of said railroad company, on December 4, 1872, and a certified copy thereof was accordingly filed in the General Land Office of the Interior Department. On July 30, 1873, the Port Huron & Lake Michigan Railroad Company was duly consolidated with the Peninsular Railway Company, whose line of railroad extended from Lansing, Michigan, to Valparaiso, Indiana, under the corporate name of the Chicago & Lake Huron Railroad Company. At the time men-

tioned the line of railroad between Flint and Lansing, Michigan, was uncompleted. In 1874, the Chicago & Northeastern Railroad Company was organized for the purpose of completing the gap between Flint and Lansing and utilizing the work already done. The line of road between Flint and Lansing, was completed on or about January 1, 1877.

On May 1, 1869, the Port Huron & Lake Michigan Railroad Company had mortgaged its line of road from Port Huron, through Lapeer and Flint, to Lansing, in the State of Michigan, together with all franchises, machinery, tools, rolling stock and equipment for the construction, operation and repair of said railroad then held or thereafter acquired, and all other property, real and personal, then owned or that might thereafter be acquired by it, to the Union Trust Company of New York, as trustee, to secure payment of certain of its bonds with interest thereon.

In September, 1875, foreclosure proceedings were commenced on said mortgage by the Union Trust Company of New York, as trustee, and by supplemental proceedings thereafter taken, William Bowes, trustee for the Port Huron & Lake Michigan Railroad Company, was made a party defendant to said foreclosure proceedings. Decree for foreclosure was entered in March, 1878, by which it was provided that in default of payment of the amount therein ordered to be paid, the complainant, the Union Trust Company, of New York, as trustee, should sell at public auction the property described in said mortgage. Said property was bought in at the sale in June, 1879, by purchasers who conveyed to the Northwestern Grand Trunk Railway Company, which thus became the owner of the road from Port Huron to Flint. Subsequent consolidations were made until October 31, 1900, when the Grand Trunk Western Railway Company, plaintiff herein, became the owner of said line of road between Port Huron and Flint and other lines as well.

VI.

On November 18, 1871, the Port Huron & Lake Michigan Railroad Company, through its officers and agents, appeared before the Board of Control of Railroads of the State of Michigan, and asked that the lands that had previously been certified by the Secretary of Interior to the governor of Michigan for the Detroit & Milwaukee Railway Company, and the Port Huron & Milwaukee Railway Company, be conferred upon it for the purpose of aiding it in the construction of said railroad, which was described as extending from Grand Haven to Flint and thence to Port Huron. The Board of Control passed a resolution declaring that if said lands, or any portion of them, could be lawfully appropriated to said Port Huron and Lake Michigan Railroad Company for the purpose of aiding in the construction of the railroad in the Act of Congress, and in the Michigan Act mentioned, subject to the restrictions of the Act of Congress, the same should, and of right ought to be done, but expressed some doubt as to its legal right to transfer the title in said lands to said company.

On May 1, 1873, the Port Huron & Lake Michigan Railroad Company presented a petition to the Board of Control for Railroads in the State of Michigan, referring to the action of the Board of Control of November 18, 1871, to the effect that the Port Huron & Lake Michigan Railroad Company was justly entitled to, and ought to receive, to aid in the construction of their road, the lands granted by Congress, reciting that documents were filed therewith, showing that the title to said granted lands was still in the State of Michigan, with the right to dispose of them for the purposes specified in said grant, reciting that the company had completed sixty-six miles of the unfinished portion of said line, and was the only company applying for, or entitled to said lands within the provisions of the grant. The petition asked for such action as would confer on said company the rights, privileges, interest and title in said lands which were vested in, or which might innure to the State of

Michigan, and expressed a willingness that conditions might be annexed in behalf of actual settlers and homestead occupants on a portion of said land.

On the first of May, 1873, the Board of Control of Railroads ordered and directed the transfer and grant of said lands to said Railroad Company, and on May 30, 1873, the governor of Michigan executed and delivered an instrument in writing, which recited the granting of the lands by the Act of Congress, the passage of the Michigan Act, the committing of the management and disposition of said land to the Board of Control, the grants to the Detroit & Milwaukee Railway Company, and to the Port Huron & Milwaukee Railway Company, the qualified acceptance by those companies, the forfeiture by the Board of Control of the rights of those companies in the lands, the grant to certain individuals as trustees, the subsequent releasing by said trustees, the action of the Board of Control, the provisions made for settlers on the land, and the request of the Port Huron & Lake Michigan Railroad Company for evidence of title to said lands. After the foregoing and some other recitals, a patent was executed by the governor, in the name and by the authority of the People of the State of Michigan, releasing and conferring upon said Port Huron & Lake Michigan Railroad Company, their successors and assigns, all and every the right, title and interest remaining in, or which at any time thereafter for the purposes contemplated by the Act of Congress, accrue to the State of Michigan in and to said lands referred to and described in said resolutions of said Board of Control of railroad lands for the purpose of constructing, or aiding in constructing, and completing their said road, but subject to the conditions in favor of actual settlers and occupants upon certain of said lands as in the resolutions set forth and expressed, and reciting that a more particular description of said lands will be found in four certain certificates from the Commissioner of the General Land Office at Washington, attached to said Patent, and specifically described in it, which four certificates, embraced in all 36,731.73 acres. To have and to hold the said above described and granted premises pursuant and subject to said resolutions of said Board of Control of railroad

lands, and the conditions and provisions therein contained unto the Port Huron & Lake Michigan Railroad Company, their successors and assigns forever.

In the certificates or lists mentioned in said instrument the lands are specifically described by section, township, range and acreage in tract, which instrument and certificates or lists were duly recorded in the General Land Office of the Department, in the office of the Secretary of State of the State of Michigan, and in the proper offices of the various counties through which said line of railroad passed.

Said lists or certificates described 36,731.73 acres of land, 6,428.68 acres being the same land described in the certificate of the Secretary of Interior, dated November 1, 1864, and mentioned in Finding V. On May 25, 1875, the following instrument in writing, bearing date May 30, 1873, was filed in the office of the Secretary of State of Michigan, viz.:

> "Whereas, the board of control of railroad lands of the State of Michigan, at a meeting held at the city of Detroit, on the first and second days of May, in the year, A. D., eighteen hundred and seventy-three, did grant to and confer upon the Port Huron & Lake Michigan Railroad Company, of the State of Michigan, certain lands of the said State of Michigan granted to the said State by Act of Congress of June 3, A. D., eighteen hundred and fifty-six, to aid in the construction of a railroad from Grand Haven to Flint and thence to Port Huron, in the said State of Michigan, certain lands appertaining to said route;
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> "And, whereas, the said Port Huron & Lake Michigan Railroad Company, at a regular meeting of the board of directors of said railroad company, held for the purpose at the City of Port Huron, in said State, on the 30th day of May, A. D. eighteen hundred and seventy-three, did resolve and conclude and determine to receive and accept such of the aforesaid lands as the said board of control might confer upon said railroad company, subject to all the restrictions and conditions then imposed by the said board of control:

"Therefore, this is to certify that the said Port Huron & Lake Michigan Railroad Company, by the unanimous vote of all the directors of said railroad company, at a regular meeting of said directors for that purpose held at the City of Port Huron, aforesaid, on this 30th day of May, A. D., 1873, does hereby accept the said lands, franchises, rights, powers, and privileges therein and thereby conferred, together with all the several conditions and restrictions mentioned, and the said railroad company does hereby assent and agree to the provisions and requirements of the Acts of the Legislature of the said State of Michigan, and the said Act of Congress before referred to.

"In witness whereof this instrument is signed by me, Edgar White, president of the said Port Huron & Lake Michigan Railroad Company, the day and year above written.

"And I, Edward B. Taylor, secretary of the said railroad company, have the day and year above written, attested this instrument by causing the seal of said railroad company to be hereto attached, this 30th day of May, A. D., 1873.

Edward B. Taylor,
(Seal.) Secretary, P. H. & L. M. R. R.
Edgar White,
President, P. H. & L. M. R. R. Co."

At a meeting of the board of directors of the Port Huron & Lake Michigan Railroad Company, held May 13, 1873, William L. Bancroft and Edgar White were appointed to take such measures as to them seemed best for the sale and disposition of the lands granted by Congress to the State of Michigan, in aid of the construction of the line of road from Grand Haven to Flint, and thence to Port Huron, and by the said State conveyed to said company, and were authorized to appoint agents to make deeds of conveyance of said lands. Subsequently they selected one William R. Bowes, as agent or trustee in trust to sell and convey the lands referred to for said company, and a deed of conveyance of

said lands in trust was thereupon made to him. This action of Bancroft and White was approved by the board of directors on July 30, 1873. Under date of April 13, 1874, the governor of Michigan certified to the Secretary of Interior, the completion of sixty miles of railroad between Port Huron and Flint by said Port Huron & Lake Michigan Railroad Company.

In 1877, the Legislature of the State of Michigan passed the following Act, which was approved May 14, 1877 (Laws Mich., 1877, page 121):

> "Section 1. The people of the State of Michigan enact, that the action of the board of control of railroads, on the first day of May, 1873, in conferring upon the Port Huron & Lake Michigan Railroad Company certain lands, granted by the Congress of the United States to the State of Michigan, June 3, 1856, to aid in the construction of a railroad from Grand Haven and Pere Marquette to Flint, and thence to Port Huron, is hereby ratified and confirmed, with like force and effect as if said board had, at the time of its said action, due and full authority in that behalf: Provided, however, that nothing in this Act shall impair or affect any valid right or interest heretofore acquired by any individual or corporation in said lands or any part thereof.
>
> "Section 2. The action of the governor of this State in conveying said lands to the Port Huron & Lake Michigan Railroad Company, on the (30th) thirtieth day of May, eighteen hundred and seventy-three, in pursuance of the Act of said board of control of railroads, is hereby ratified and confirmed, and said conveyance shall be deemed to be of full force and effect from the date thereof."

VII.

In March, 1899, the second assistant Postmaster General sent to the Chicago & Grand Trunk Railway Company, a distance circular and agreement for the transportation of mails over postal route No. 137,039, from Port Huron, Michigan, to Chicago, Illinois, for the four-year period beginning July 1, 1899, which was duly executed by said Railway Company and returned to the Postmaster General. The distance circular contained the usual provisions leading up to a mail contract, and thereafter, on October 17, 1899, after the weighing of the mails had been completed and compensation for the transportation thereof fixed for the term, the Second Assistant Postmaster General addressed a communication to the said Chicago & Grand Trunk Railway Company informing it that:

> "Compensation for the transportation of mails, etc., on route No. 137,039, between Port Huron, Michigan, and Chicago, Illinois, has been fixed from July 1, 1899, to June 30, 1903, under Acts of March 3, 1873; July 12, 1876, and June 17, 1877, at the rate of $105,210.64 per annum. * * * This adjustment is subject to further orders and to fines and deductions, and is based on a service of not less than six round trips per week."

Subsequently, on January 24, 1901, the Postmaster General issued an order recognizing the Grand Trunk Western Railway Company as being entitled to the compensation due, or to become due for services performed on that route.

In February, 1903; February, 1907, and February, 1911, said Second Assistant Postmaster General sent to the plaintiff company like distance circulars and agreements for the transportation of mails over said road from Port Huron to Chicago, Illinois, for the four-year periods beginning respectively, July 1, 1903; July 1, 1907; July 1, 1911, each of which was duly executed by said company and returned to

the Postmaster General, which were followed in each of the years mentioned by a communication to the plaintiff company informing it of the compensation fixed for the transportation of the mail. The amount found to be due the plaintiff company for the term beginning July 1, 1911, was stated by the Postmaster General to be $99,858.95 per annum, exclusive of the use of the railway postoffice cars.

Thereafter, on December 28, 1912, the Postmaster General modified and approved an order of the Second Assistant Postmaster General, issued November 27, 1912, which restated and reduced the amount to which the plaintiff company, by said orders of January, 1901; August, 1903; October, 1907, and October 1911, had been stated to be entitled for the transportation of said mails, so as to cause the same to provide pay between Port Huron R. R. station and Flint, Michigan, on a land-grant basis. The Postmaster General thereupon reduced the pay of the plaintiff company for the period, November 1, 1912, to June 30, 1915, from the said annual basis of $99,858.95 to $96,075.24 and deducted $50,359.70 for overpayment from October 1, 1900, to October 31, 1912, from the pay of the plaintiff company for the year ending June 30, 1913.

VIII.

From the time of the establishment of the postal route from Port Huron to Lapeer, in 1871, and the establishment of that route from Port Huron to Flint, in January, 1872, the mails have been carried over the route between Port Huron and Flint by the respective companies owning it, and during all that time down to November 27, 1912, the road from Port Huron to Flint, and every part thereof, was continuously and uniformly treated by the Department in its orders stating the route and its termini, and fixing the pay for carrying the mails, and its distance circulars and contracts for the carrying of mails, and in its full payments without deduction of the various companies for carrying the mails, as a nonland aided or nonland grant road.

In the report of the Postmaster General for 1883, the officials of the Department began the practice, which they continued until 1912, of stating the names of the roads that had been aided wholly or partially in their construction by land grants. In none of those reports was the road or the route between Flint and Port Huron stated as land aided or as a land grant road, either wholly or partially.

The War Department uniformly and continuously treated and dealt with the various companies owning that road on the theory that it was not a land aided or a land grant road from December 12, 1871, to some time in the year 1912.

IX.

Early in the year 1912, the War Department requested the Comptroller of the Treasury for an advance or advisory decision as to whether or not the road between Port Huron and Flint was a laid aided or land grant road, and March 29, 1912, the Comptroller rendered a decision in which he held that it was a land grant road, and on further consideration, August 30, 1912, the Comptroller rendered a decision in which he affirmed the former one. Pursuant to that ruling, and on that account, November 27, 1912, the Postmaster General issued orders concerning said postal route, which are set forth and described in Finding VII. Petitioner filed its claim with the auditor for the Postoffice Department for the amount of, to-wit: $52,566.87, as due to it for the transportation of the mails from November 1, 1912, to June 30, 1913, but the auditor for that department disallowed the claim. Petitioner then appealed the case to the Comptroller of the Treasury, who, August 20, 1913, affirmed the action of the auditor in the premises.

Conclusion of Law.

On the findings of fact, the Court decided as a conclusion of law, that the petition should be dismissed, and the same was dismissed and judgment rendered in favor of the United States, against the plaintiff, for the cost of printing the record, in the sum of $588.00.

SUMMARY.

We submit that the findings may be summarized briefly as follows:

1. Plaintiff is a railroad corporation engaged in carrying mails for the United States.

2. June 3, 1856, Congress passed an Act granting to the State of Michigan, lands to aid in the construction of railroads in that state, one line being described as from Grand Haven and Pere Marquette to Flint, and thence to Port Huron. The grant was for each alternate section of land designated by odd numbers for six sections in width on each side of said road. The Act contained the usual provisions, excepting from the grant lands previously sold or otherwise appropriated and provided for indemnity or lieu lands within the fifteen mile limits. The Act further provided that sections, or parts of sections, of land which should remain in United States within six miles on each side of said road, should not be sold for less than double the minimum price of public lands when sold.

It was provided that the lands granted to the state should be subject to the disposal of the legislature for the purpose of the grant and no other, and that said railroads should remain public highways for the use of the government of the United States, free from toll or other charges upon the transportation of property or troops in the United States. It also contained the usual provisions for disposing of the

land in providing that a quantity, not exceeding one hundred twenty sections within a continuous length of twenty miles on the road, might be sold, and subsequent sales should be made only as the governor of the state should certify to the Secretary of Interior that succeeding portions of twenty continuous miles had been completed, when an additional one hundred twenty sections might be sold.

By Section 5 of the Act, the condition was attached that the United States mail shall be transported over said roads, under the direction of the Postoffice Department, at such price as Congress might, by law, direct, provided that until such price is fixed by law, the Postmaster General shall have power to determine the same.

3. By the Act of February 14, 1857, the Act of Congress of June 3rd, 1856, was accepted by the State of Michigan, with the restrictions, and upon the terms and conditions, contained in said Act of Congress. The proposed line from Grand Haven to Flint and thence to Port Huron, was divided at Owosso, the lands west of Owosso being granted to the Detroit & Milwaukee Railway Company, and the lands east of Owosso to the Port Huron & Milwaukee Railway Company, to aid in the construction of the roads of said companies, respectively. The Michigan Act also provided that the lands should be exclusively applied in the construction of their respective lines of railroad, and followed the Act of Congress in its provisions as to transportation of property and troops of the United States, and provided that the United States mails should be transported over said railroads, under the direction of the Postoffice Department, at such price as Congress might, by law, direct.

In order to become entitled to the lands, the railroad companies were required to accept the lands, which acceptance should be embodied in a written instrument. In such instrument, each of said companies was required to severally assent and agree to the provisions or requirements of the Michigan Act. Section 20 of the Michigan Act, provided for a specific annual tax to be paid into the treasury of the state.

Section 13 of the Act of Congress, approved July 12, 1876, 19 Stat. L., page 82, Chap. 179, is the statute requiring land grant roads to transport mail at eighty per centum of the compensation allowed to other roads.

4. The Detroit & Milwaukee Railway Company, and the Port Huron & Milwaukee Railway Company, each filed an attempted acceptance of the Act, and each protested against Section 20 of the Michigan Act, and refused its acceptance to the provisions of that section. Because the lands had not been unconditionally accepted, the Board of Control, on August 26, 1857, declared the lands forfeited as to those companies.

5. The Detroit & Milwaukee Railway Company's projected line of road extended from Owosso, in Shiawassee County, west to Grand Haven, State of Michigan.

The Port Huron & Milwaukee Railway Company proposed to build a line from Port Huron to some point on Lake Michigan. It secured rights of way, did a small amount of work between Port Huron and Flint, and made a mortgage in 1856, of all its property, which was afterwards foreclosed and by mesne conveyances, conveyed to trustees for the Port Huron & Lake Michigan Railroad Company, in 1865, and conveyed by said trustees to the Port Huron & Lake Michigan Railroad Company, July 25, 1873.

The Port Huron & Lake Michigan Railroad Company was chartered in 1847, to construct a road from Port Huron to some point on Lake Michigan, at or near the mouth of the Grand River.

On June 3, 1863, the Secretary of Interior certified to the governor of Michigan, 30,998.76 acres of land lying west of Flint for the Detroit & Milwaukee Railway Company, and November 1, 1864, 6,428.68 acres were certified for the Port Huron & Milwaukee Railway Company. The lands last mentioned lay to the north and south of the railroad afterwards constructed between Port Huron and Flint.

The major portion of the work of constructing the line of railroad between Port Huron and Flint was done by the Port Huron & Lake Michigan Railroad Company, and its said railroad was completed and in operation, from Port Huron to Imlay City, and then Lapeer, by the fall of 1870, and from Port Huron to Flint, on December 12, 1871, and is the only line ever built directly connecting Port Huron and Flint.

On May 1, 1869, the Port Huron & Lake Michigan Railroad Company mortgaged its line from Port Huron to Lansing, and was afterwards consolidated with the Peninsular Railroad Company, and in 1874, the Chicago & Northeastern Railroad Company was organized, and completed the gap between Flint and Lansing, on or about January 1, 1877.

The mortgage given by the Port Huron & Lake Michigan Railroad Company was foreclosed in 1875, the property sold under the foreclosure proceedings in June, 1879, and bought by purchasers who conveyed to the Northwestern & Grand Trunk Railway Company, and subsequent consolidations were made until October 31, 1900, when the Grand Trunk Western Railway Company, plaintiff herein, became the owner of said line of railroad between Port Huron and Flint, and other lines as well.

6. On November 18, 1871, the Port Huron & Lake Michigan Railroad Company applied to the Board of Control of Railroads for the lands that had been certified by the Secretary of Interior for the Detroit & Milwaukee Railway Company, and the Port Huron & Milwaukee Railway Company. The Board of Control did not make the grant because of doubt as to its legal right to transfer said lands to said company.

The request was renewed May 1, 1873, by a memorial printed in full in the record, page 21, and on that date said Board of Control directed the transfer and grant of said lands to said railroad company. On May 30, 1873, Governor

Bagley, of Michigan, made the patent of the State for all of said lands, 36,731.73 acres.

On May 25, 1875, an instrument bearing date May 30, 1873, was filed in the office of the Secretary of State of Michigan. This instrument was the formal acceptance of the grant required by the Michigan Act, and the railroad company did, by such instrument, accept the said lands, franchises, rights, powers and privileges therein and thereby conferred, together with all the several conditions and restrictions mentioned, and further recited:

> "the said railroad company does hereby assent and agree to the provisions and requirements of the Acts of the Legislature of the State of Michigan, and the said Act of Congress before referred to."

In 1873, William L. Bancroft, and Edgar White, were duly appointed by the Port Huron & Lake Michigan Railroad Company to take such measures as to them seemed best for the sale and disposition of the lands granted by Congress to the State of Michigan in aid of the construction of the line of railroad between Grand Haven and Flint, and thence to Port Huron, and by the state conveyed to the said company. They selected William R. Bowes, as trustee, and made a conveyance of said lands to him in trust. Under date, April 3, 1874, the Governor of Michigan certified to the Secretary of Interior the completion of sixty miles of railroad between Port Huron and Flint, by the Port Huron & Lake Michigan Railroad Company.

In 1877, the legislature of the State of Michigan passed an Act to ratify and confirm the action of the Board of Control, in granting, and the action of the governor of Michigan, in conveying, the lands to the Port Huron & Lake Michigan Railroad Company.

March 3, 1879, Congress released to the State of Michigan the lands under consideration with the proviso saving legal and equitable rights in said lands, which had been acquired.

In 1881, the Michigan legislature passed an Act ratifying and confirming the action of the Board of Control in granting lands to the Port Huron & Lake Michigan Railroad Company, so far as it related to such lands as are situated north and south of the railroad constructed from Port Huron to Flint, "with like force and effect as if said Board had at the time of its action due and full authority in that behalf," and also ratifying and confirming the action of the governor in conveying lands so situated to the Port Huron & Lake Michigan Railroad Company.

7. In 1899, the Postoffice Department made a four-year contract with the Chicago & Grand Trunk Railway Company, for the transportation of the mails on route 137,039, between Port Huron, Michigan, and Chicago, Illinois, and on January 24, 1901, the Grand Trunk Western Railway Company was recognized as being entitled to the compensation due or to become due for services on that route. In 1903, 1907 and 1911, ordinary four-year contracts were made for the transportation of the mails over said road at full pay rates for all of said route.

In 1912, all of such orders were modified so as to provide pay between Port Huron railroad station and Flint, Michigan, on a land grant basis. The Postmaster General reduced the pay of plaintiff company for the period November 1, 1912, to June 30, 1915, from the annual basis of $99,958.95 to $96,075.24, and deducted $50,359.70 for overpayment, from October 1, 1900, to October 31, 1912, from the pay of the plaintiff company for the year ending June 30, 1913.

8. In all the dealings with the department, from 1871, down to November 27, 1912, the railroad from Port Huron to Flint, and each and every part thereof, was continuously and uniformly treated as a nonland aided or nonland grant road.

The report of the Postmaster General for 1883 contained a list of the names of the roads that had wholly or partially in their construction been aided by land grants, and the reports of the Postmaster Generals for each year, down to 1912, continuing the practice commenced in 1883, contained

like lists of names of land grant roads. In none of these reports was the road or route between Port Huron and Flint stated as land aided or as a land grant road, either wholly or partially.

From the time the operation of the road between Port Huron and Flint was begun, December 12, 1871, until some time in the year 1912, the War Department uniformly and continuously treated and dealt with the various companies owning that road, on the theory that it was not land aided or a land grant road, and paid the compensation due for transporting property and troops of the United States, as a nonland aided or nonland grant road.

9. After the Postmaster General issued orders concerning said postal route, which were set forth and described in Finding VII, petitioner filed its claim with the Auditor of the Postoffice Department for the amount of, to-wit: $52,566.87, as due to it for the transportation of the mails from November 1, 1912, to June 30, 1913, which claim was disallowed by the Auditor of that department, which action was sustained by the Comptroller of the Treasury, August 20, 1913.

10. The Court of Claims dismissed the petition of plaintiff.

ASSIGNMENTS OF ERROR.

1. The Court below erred, on the facts found, in dismissing the petition.

2. The Court below erred, on the facts found, in not rendering judgment in favor of the appellant in the sum of $32,566.87.

3. The Court below erred, on the facts found, in holding that portion of appellant's railroad between Port Huron and Flint, Michigan, a laid aided or land grant road.

4. The Court below erred, on the facts found, in holding that Sec. 13 of the Act of Congress of July 12, 1876, 19 Stat. L., page 82, applies to that portion of appellant's railroad between Port Huron and Flint, Michigan.

5. The Court below erred, on the facts found, in holding that appellant was bound by contract to transport the mails over that portion of its railroad between Port Huron and Flint, Michigan, on a land grant basis.

6. The Court below erred, under the facts found, in holding that the Port Huron & Lake Michigan Railroad Company acquired title to 6,428.68 acres of land, east of Owosso, through the patent of the State of Michigan, instead of by the Act of the Michigan legislature of June 9, 1881, and under the release of Congress, of March 3, 1879.

7. The Court below erred, on the facts found, in holding that appellant is estopped from claiming that the portion of its railroad between Port Huron and Flint, Michigan, is not a land aided or land grant road.

8. The Court below erred, on the facts found, in holding that the Government is not bound by the rulings of the Postoffice Department and the War Department to the ef-

fect that the railroad between Port Huron and Flint, Michigan, is not a land aided or land grant road.

The Assignments of Error may be summarized into the following issues:

I. The basis of the statute requiring land grant railroads to transport mails at eighty per centum of the price allowed other railroads must be a valid contract. Assignments of error 1, 2, 3 and 4.

II. There is no valid contract in this case requiring the railroad to transport the mails at land grant rates. Assignment of error 5.

III. The railroad between Port Huron and Flint, Michigan, was not constructed in whole or in part by a land grant made by Congress. Assignments of error 3, 4 and 5.

IV. The Port Huron & Lake Michigan Railroad took title to the lands east of Flint as a gift or subsidy under the Act of the Michigan legislature approved June 9, 1881, and not under the patent of May 30, 1873. Assignment of error 6.

V. The appellant is not estopped to claim that there is no valid contract. Assignment of error 7.

VI. The Government is bound by the departmental construction extending over forty years. Assignment of error 8.

BRIEF OF ARGUMENT.

I.

There Must Be a Valid Contract.

The basis of the statute requiring land grant railroads to transport mails at eighty per centum of the price allowed other railroads must be a valid contract.

Section 13 of the Act of Congress, approved July 12, 1876, 19 Stat. L., page 82, Chap. 179, reads as follows:

> "Sec. 13. The railroad companies whose railroad was constructed in whole or in part by land grant made by Congress, on the condition that the mails should be transported over their road at such price as Congress should, by law, direct, shall receive only eighty per centum of the compensation authorized by this Act."

The statute shows on its face that it is based on contract rights. It applies only to railroad companies whose road was constructed in whole or in part by the aid of a land grant made by Congress on the condition that the mails should be transported over that road at such price as Congress should, by law, direct. That is, to come within the terms of that Act, the condition must have been assented to, and the railroad must have been constructed in whole or in part by a land grant. The land grant is the consideration for the promise of the railroad to carry mails, and carry them at a price fixed by Congress.

It was beyond the power of Congress as a pure Act of legislation to require any railroad to carry mail at any price less than a fair and reasonable one.

To say that all common carrier railroads shall carry mails at a fair and reasonable compensation is one thing, and clearly within the power of Congress, but to say that any

railroad shall transport the mails at eighty per centum of the fair and reasonable compensation allowed other roads for the same service, is quite a different matter.

Section 13 is valid, because it applies to railroad companies which have received, and used in the construction of their railroad, grants of land upon condition that the mail should be transported over that road at such price as Congress should, by law, direct. The promise of the land grant road to be bound by the conditions of the grant completes the contract, and gives to the government as the seller of the land, the right to require the mails to be carried over the road at a rate fixed by Congress, a right which the United States did not have in its sovereign capacity.

Clearly, the right to require the mails to be transported at eighty per centum of a fair and reasonable rate is a contract right. The contract saves the statute and prevents its being open to the constitutional objections that it takes property for public use without just compensation and deprives the railroad of its property without due process of law.

We dwell on these elementary principles because the Court of Claims seems to have overlooked the importance, and even the necessity, of a contract as the basis of the right asserted by the United States in this case.

It was held in *Lake Shore & M. S. Ry. Co. v. Smith, 173 U. S., 684 (19 Sup. Ct. Rep., 565)*, that Public Acts, Mich., 1891, No. 90, requiring railroad companies in the state to keep for sale, 1,000-mile tickets at specified rates, less than the regular rates, to be used in the name of the purchaser, his wife and children, and valid for two years, where the maximum rates for transportation of passengers have been previously established by the legislature, is void as not within the legislative power to fix maximum rates, nor a proper regulation of the affairs of the company, but, on the contrary, a taking of the property of the company without due process of law.

In *Sinking Fund Cases, 99 U. S., 700 (718)*, Mr Chief Justice Waite, in delivering the opinion of the Court, said:

> "The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents states from passing laws impairing the obligation of contracts, but equally with the states they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they, by legislation, compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

In the dissenting opinion of Mr. Justice Strong in the same case (page 731), quotation is made from the celebrated communication of Mr. Hamilton, to the Senate, of Jan. 20, 1795, as follows:

> "When a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law

which can vary the effect of it. *3 Hamilton's Works, 518, 519.*"

Continuing, Mr. Justice Strong said:

> "Opinions similar to this have often found expression in judicial decisions, even in those of this court. If this be sound doctrine, it is as much beyond the power of a legislature, under any pretense, to alter a contract into which the government has entered with a private individual, as it is for any other party to a contract to change its terms without the consent of the person contracting with him. As to its contract the government in all its departments has laid aside its sovereignty, and it stands on the same footing with private contractors."

In *Jacksonville, P. & M. R. R. Co. v. U. S., 21 Court of Claims, 155,* it was held that a land grant road is under perpetual contract to carry mails at such rate as Congress may, by law, direct, or the Postmaster General determine. Roads which are aided with bonds are entitled to fair and reasonable compensation, not in excess of the rate paid by private parties for the same kind of service. Both are obliged to perform the service. Other companies are not bound to perform the service at all against their will.

That case was affirmed in this Court. *118 U. S., 626 (7 Sup. Ct. Rep., 48).*

If a land grant road is under perpetual contract to carry mails, clearly the United States is the other party to the contract, and the contract is made when the railroad accepts the offer of the Government to grant the lands, and the acceptance of the railroad of the conditions of the grant is the promise of the railroad to carry the mails, and allow Congress to fix the consideration. All the elements of a contract are present and both parties are bound in contract relation.

In *Rogers v. P. H. & L. M. R. Co., 45 Mich., 460 (468),*

Mr. Justice Campbell, speaking for the Court in relation to the land grant here involved, said as to the acceptance:

> "This acceptance was the only act whereby any of these companies was brought into contract relations with the state at all. The law did not assume to force the grant upon any company, and the contract could not bind either party until both assented to the same agreements and conditions."

In *Union Pacific R. R. Co. v. U. S., 104 U. S., 662,* the Court had under consideration Sec. 6 of land grant Act to the Union Pacific, which annexed to the land grant to that railroad the condition that the railroad should transport mails, troops, and munitions of war, supplies and public stores upon such railroad for the Government, at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service. It was said:

> "We have no hesitation in conceding that the section quoted constituted a contract between the railroad and the United States."

It was held that the contract precluded the application of the general statute fixing the maximum rate, graded according to weights, readjusting compensation of railroads carrying mails.

It was said in *Atchison, T. & S. F. R. Co. v. U. S., 225 U. S., 640 (32 Sup. Ct. Rep., 702),* that Congress had not legislated so as to require compulsory mail service at adequate compensation, to be judicially determined, or in a method provided by statute, and a railroad that had not been aided by a land grant was not, under existing law, obliged to carry mails when tendered. Citing:

Eastern R. R. Co. v. U. S., 129 U. S., 395 (9 Sup. Ct. Rep., 320).

U. S. v. Alabama G. S. R. Co., 142 U. S., 615 (12 Sup. Ct. Rep., 306).

It is clear, therefore, that the right to require land grant railroads to transport the mails over their roads at such price as Congress shall, by law, direct, is a contract right, to be measured and applied by the rules of law applicable to contracts between private parties.

The United States, in making contracts, lays aside its sovereignty and its contracts are tested as to validity and invalidity by the same principles which govern those of other contractors.

II.

There Is No Valid Contract in This Case Requiring the Railroad to Transport the Mails at Land Grant Rates.

1. The attempt to make a contract.

The land grant of Congress relied on in this case was to the State of Michigan, in trust for the purposes stated in the Act. The Act of the Michigan legislature was an offer to the Detroit & Milwaukee Railway Company and the Port Huron & Milwaukee Railway Company of lands, to be unconditionally accepted by them, or rejected. The lands were not accepted unconditionally. Both railroads refused to accept the lands burdened by the tax features contained in Section 20 of the Michigan Act, and no contract was made. The Board of Control, for that reason, declared the lands forfeited, and the title remained in the State of Michigan. An attempt was made to vest title in trustees, but nothing was done by the trustees and they afterwards released all claims to the land.

Neither Congress nor the State of Michigan attempted to, nor could they force the lands on any person or corporation. The State of Michigan, as trustee, was acting as a proprietor in selling the lands. In that capacity it could, and did treat with the purchasers precisely as any other proprietor might, offering, agreeing upon and accepting terms and entering into stipulations from which it would

not be at liberty to depart, and to which it could not add in the smallest particular, except with the consent of the parties with whom it was dealing. The State as a sovereign could not deal with the lands otherwise than as it might between two private citizens.

> *Robertson v. Land Commissioner, 44 Mich., 274 (278).*

From 1857, when Michigan accepted the grant, until 1873, Michigan held title to the lands, offering them for the purposes specified in the Act of Congress, on the terms mentioned in the conditions in the Act of Congress, and the Act of the Michigan legislature. No railroad accepted the lands on the terms specified. The railroad, from Port Huron, westward:

> "Was completed and in operation from Port Huron to Imlay City, and then to Lapeer, in the fall of 1870, and from Port Huron to Flint, on December 12, 1871" (Finding of Fact V., R., 20).

Up to that time no contract had been made. The title to the lands was still in the State of Michigan, and the road from Port Huron to Flint had been completed and was in operation without being "constructed in whole or in part by land grant made by Congress."

On November 18, 1871, the officials of the Port Huron & Lake Michigan Railroad Company, which constructed the road from Port Huron to Flint, applied to the Board of Control for the lands, not only the Port Huron & Milwaukee lands lying east of Flint, but for all the lands, including the Detroit & Milwaukee lands west of Owosso. The grant was not made, and no contract entered into, although the Board of Control intimated that the grant should and ought to be made, but it was not made because of the doubt of the Board of Control as to its legal right to transfer the title in said lands to the said company.

The request of the Port Huron & Lake Michigan Railroad Company was renewed May 1, 1873, the request being for

all the lands, and on the same day the Board of Control directed the grant to be made.

The grant was of all the lands pertaining to the line from Grand Haven to Flint and thence to Port Huron, and included the lands west of Owosso originally tendered the Detroit & Milwaukee Railway Company, as well as the lands east of Owosso, which had been set apart to the Port Huron & Milwaukee Railway Company. On May 30, 1873, Governor Bagley made a patent purporting to be issued under the resolution of the Board of Control, to convey to the company the interest of the State in all of such lands comprising 36,731.73 acres, 6,428.68 acres of which were east of Owosso, and the balance west of Owosso, and far removed from the western terminus of the railroad that had been constructed from Port Huron to Flint.

On May 30, 1873, the Board of Directors of the Port Huron & Lake Michigan Railroad Company accepted the grant of all the lands and assented and agreed to the provisions and requirements of the Acts of the legislature of the State of Michigan, and the Act of Congress.

Then, if ever, a contract was made. The state had granted 36,731.73 acres of land, and the Port Huron & Lake Michigan Railroad Company had agreed in consideration of the grant of that land, to be bound by the conditions of the grant.

2. The contract was void for illegality.

In *Bowes v. Haywood, 35 Mich., 241,* this grant was held void because the land involved was not along the line constructed, or to be constructed, by the Port Huron & Lake Michigan Railroad to which the grant was made. The Michigan legislature of 1877 passed the Act found in Finding VI (R., 27), and in 1879, Congress released to the State of Michigan, the reversionary interest of the United States in the land under consideration (R., 28).

Notwithstanding this legislation, the Supreme Court of

Michigan, in *Fenn v. Kinsey, 45 Mich., 446,* held the conveyance from the Governor so absolutely void that it could not be ratified by an Act of the legislature.

That case was decided in 1881, after Congress had, in 1879, released the claim of the United States to the land, and the action of the Governor was sought to be sustained on the ground that such action by Congress made valid the prior action of the Michigan legislature in attempting to validate the action of the Board of Control and the governor in conferring upon and conveying the land to the Port Huron & Lake Michigan Railroad.

Mr. Justice Campbell, speaking for the Court, said:

> "At the time when the Act of 1877 was passed, it is beyond question that the State was bound by the terms of the Congressional grant, which were formally accepted by the Law of 1857, to dispose of none of these lands except for the specific purposes named in the Act of Congress. As the United States reserved a right to all lands not legally disposed of under the trust, and under the grant, the State itself had no power to divert them, the Act of 1877 was in direct violation of that clause of the Constitution of the United States which declares that no State shall pass any law violating the obligation of contracts.
>
> "To hold that such a law operated by way of estoppel would be in effect to destroy the weight of the constitutional prohibition. The only proper way to construe void legislation, is to treat it as absolutely void until the legislative power, after obtaining authority to do so, sees fit to re-enact it. Congress did not attempt to bind the State to carry out its illegal action, and could not have done so. Any State legislature, after 1877, had a right to treat that legislation as if it had never been passed, and a mere release from the obligations of the original contract by Congress could not operate to ratify the illegal action of the State legislature. It is for the State it-

> self, now that it has plenary power, to act as if there had been nothing done before."

It was thus thoroughly established by the law of Michigan, that the attempted grant of lands, at least as to those west of Owosso, was made in violation of the trust by which the State held the land from the United States, and was void for illegality.

In the case of *Schulenberg v. Harriman, 21 Wall., 44,* in the consideration of the land grant Act of June 3, 1856, for the benefit of the State of Wisconsin, and also the Act of March 10, 1869, passed by the legislature of that state, which seems to be similar in effect to the Michigan Act of 1857, Mr. Justice Field held untenable the position, that if the Act of Congress vested in the state a title to the land, that title was transferred by the Act of its legislature, and then said:

> "The state, by the terms of the grants from Congress, possessed no authority to dispose of the land beyond one hundred twenty sections, except as the road, in aid of which the grants were made, was constructed. * * * The Acts of Congress made it a condition precedent to the conveyances by the state of any other lands, that the road should be constructed in sections of not less than twenty consecutive miles each. No conveyance in violation of the terms of those Acts, the road not having been constructed, could pass any title to the company."

In *Swan v. Miller, 82 Ala., 530 (1 So. Rep., 65),* a bill was filed for specific performance of two executory contracts for the sale of two parcels of railroad land made in advance of the construction of the road. The land grant to Alabama was made on the same day as the Michigan grant involved in this case, and under the same terms and conditions. The General Assembly passed Acts to protect the title, legal and equitable, of *bona fide* purchasers of railroad lands. It was held that the Act of Congress, conferring title to those lands, was a law as well as a grant; that the

contracts of sale made in advance of the construction of the road were void for illegality and were incapable of ratification.

That case is in harmony with *Fenn v. Kinsey, 45 Mich., 446,* in its holding that only that which is voidable can be ratified in any proper sense of the word, not that which is absolutely void.

It will not be contended by the Government that there was any validity in the attempted grant of 30,303.05 acres of the lands which lay west of Owosso. The attempted grant being absolutely void for the reason that it included the Detroit & Milwaukee lands west of Flint, and made in violation of the Act of Congress and Act of the Michigan legislature, and in violation of the trust under which the State of Michigan, held the land from the United States, the acceptance of the railroad company failed to complete a binding contract because the consideration for the acceptance and promise was an attempted grant of land which was absolutely void and in violation of law.

3. The major part of the consideration moving to the Port Huron & Lake Michigan Railroad Company for its acceptance and promise was void for illegality. The consideration was indivisible and the whole contract void.

In *Elliott on Contracts, Sec. 1076,* it is said:

> "A contract which is entire and indivisible and which contains a stipulation that is illegal and cannot be separated from the legal portion of the agreement, is corrupted by the stipulation and rendered unenforceable as an entirety."

Continuing, in Section 1077, it is said:

> "Even though it might be possible to sever the illegal from the legal portion of the contract, yet, if there are no means by which to ascertain whether the promise was induced by the legal or illegal portion, or where the consideration is unapportioned and un-

apportionable, the entire contract will be illegal, if one of the elements thereof is immoral or against public policy."

In *Parsons on Contracts*, side page 456, it is said:

"In general, if any part of the entire consideration for a promise, or any part of an entire promise be illegal, whether by statute or at common law, the whole contract is void. Indeed, the courts go far in refusing to found any rights upon wrongdoing."

To the same effect is *Wald's Pollock on Contracts*, side page 321, where the author quotes Willes, J., as saying:

"For it is impossible in such cases to apportion the weight of each part of the consideration in inducing the promises."

In *Armstrong v. Toler, 11 Wheat., 258 (271)*, it was said:

"Questions upon illegal contracts have arisen very often, both in England and in this country, and no principle is better settled than that no action can be maintained on a contract, the consideration of which is either wicked in itself or prohibited by law."

In *Coppell v. Hall, 7 Wall., 542 (558)*, it was said:

"Whenever irregularity appears, whether the evidence comes from one side or the other, a disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Whatever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

This language is cited with approval in *Continental Wall Paper Company v. Louis Voight & Co., 212 U. S., 227 (29 Sup. Ct. Rep., 280)*.

The case of the *Continental W. P. Co. v. Louis Voight & Sons Co.*, reviews the whole subject of illegal contracts. That case is a complete answer to the position of the Court of Claims in the instant case in holding that plaintiff here is estopped from insisting on the illegality of the contract, because it is claimed the Port Huron & Lake Michigan Railroad Company obtained title to the lands east of Flint.

The *Wall Paper* case was brought to recover $56,762.10 as the alleged balance on an account for merchandise sold and delivered to the defendant. The defendant purchased and took title to the wall paper and, as suggested in the dissenting opinion of Mr. Justice Brewer:

> "They doubtless sold again at the great minimum profit they agreed to exact from the retailers, and the retailers later exacted the undue profit from the consuming public."

Notwithstanding all this, this Court affirmed the dismissal of the suit because of the illegality of the original trust agreement.

The dissenting opinions both recognize the illegality of the original contract, and the dissents were placed on the ground that the contract by which the wall paper was purchased was not a part of the original illegal agreement.

In this case the deduction of $52,566.87 was made directly under the illegal contract. The illegal contract which contained the assent of the Port Huron & Lake Michigan Railroad Company to carry the mail at compensation to be fixed by Congress, is the foundation and the basis of the Government's claimed right to make the deduction which is complained of in this case, and that contract was clearly void under the decision of this Court in the *Wall Paper* case, and under the dissenting opinions as well.

In *McMullen v. Hoffman, 134 U. S., 639 (29 Sup. Ct. Rep., 280)*, where the authorities are also reviewed and the whole subject carefully examined, the Court said:

> "The authorities from the earliest time to the present, unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." Citing many English and American cases.

In *Pullman Car Company v. Central Transportation Company, 171 U. S., 711 (18 Sup. Ct. Rep., 808)*, the Central Transportation Company claimed the right to recover against the Pullman Company, compensation for property delivered to it under a void lease of its entire plant and personal property, together with its contracts with railroad companies for the use of its sleeping cars on their roads, and also the patents belonging to it.

The lease had been held invalid and void by this Court in the case of *Central Transportation Company v. Pullman Palace Car Company, 139 U. S., 24 (11 Sup. Ct. Rep., 478)*, because it was beyond the power conferred upon the Central Company by the legislature, and because it involved an abandonment by that company of its duty to the public.

The former decision was reviewed in the case in *171 U. S., 711*, and quoted from as follows:

> "The courts while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, the property or money which it had no right to retain. To maintain such an action was not to affirm, but disaffirm, the unlawful 'contract.' And the opinion of the court ended with the statement that 'whether this plaintiff could maintain any action against the defendant, in the nature of a

quantum meruit or otherwise, independently of the contract, need not be considered, because it is not presented by this record, and has not been argued. This action, according to the declaration and evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant was not liable for."

Continuing, it was said:

"The principle is not new, but, on the contrary, it has been frequently announced, commencing in cases considerably over 100 years old. It was said by Lord Mansfield, in *Holman v. Johnson (decided in 1775), 1 Cowp., 341*, that 'the objection that a contract is immoral or illegal, as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.'"

It was further said:

"The cases upholding this doctrine are numerous and emphatic. * * * They are substantially unanimous in expressing the view that in no way and through no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to

> the party who has made payment or delivered property under a void agreement, and which, in justice, he ought to recover. But courts will not, in such endeavor, permit any recovery which will weaken the rule founded upon the principles of public policy already noticed."

That case clearly holds that the United States was not entitled to recover the difference between the full compensation paid and the compensation on a land grant basis because of the invalidity of the contract relied upon to make the railroad from Port Huron to Flint, Michigan, a land grant road.

The action of the Postmaster General in this case, collecting what was claimed to be money illegally paid, was collecting under the land grant contract, and the offset was made from money belonging to the plaintiff, in lieu of a suit to recover the alleged illegal payments.

> *Wisconsin Central R. R. Co. v. U. S., 164 U. S., 190 (17 Sup. Ct. Rep., 45).*

Justice between the parties does not require compensation for the land received, if any was received, and if it did, recovery could not be had in this case.

Hazelton v. Sheckles, 202 U. S., 71 (26 Sup. Ct. Rep., 567) involved a contract for services in bringing certain property to the attention of the committees of Congress as a suitable and appropriate site for a hall of records. Some of the services were perfectly legitimate, but part of them were against public policy in that they contemplated the procuring of legislation upon a matter of public interest. The Court held the entire contract void. It was said:

> "Every part of the consideration goes equally to the whole promise, and, therefore, if any part of it is contrary to public policy, the whole promise fails."

That statement covers this case completely. The consideration for the Port Huron & Lake Michigan Railroad Com-

pany's promise was the grant of 36,731.73 acres of land, five-sixths of that consideration is conceded to be void as against public policy and in violation of the trust under which the State of Michigan held title to the land. Because of the illegality of that consideration the whole promise of the Port Huron & Lake Michigan Railroad Company failed, and the United States has no contract binding the plaintiff to carry mails at land grant rates.

Trist v. Child, 21 Wallace, 441, involved a claim for services as agent and attorney in procuring an appropriation from Congress on a claim which Trist had against the United States. The contract provided for a contingent fee. The Court pointed out that a part of the services were legitimate and could be properly charged for if standing alone, but that part consisted of lobbly services, and although if gratuitously rendered, were not unlawful, yet it was against public policy to allow such services to be rendered for a reward, especially when the reward was contingent upon success. It was said in that case:

> "We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract."

Lingle v. Snyder, 160 Fed., 627, a case in the Court of Appeals for the Eighth Circuit, involved two writings which the Court held to be a single contract of lease of lands which embraced 1,306 acres of land owned by the plaintiff in fee simple, and 4,480 acres of school lands leased by him from the State, and it was recited that the purpose was to give defendant all rights and privileges that might be derived from the use of Government lands adjoining those

above mentioned and which had theretofore been used by the plaintiff. It also embraced all the plaintiff's fencing, including the fencing of the Government lands, consisting of 11,200 acres. The Government lands had been unlawfully enclosed by plaintiff. It was held that the entire contract was void, although embraced in it were lands lawfully held and fences lawfully maintained by the plaintiff, as it could not be said that the parties would ever have contracted at all if the legal provisions were alone considered, or if so, upon what terms and conditions. It was further said:

> "If legal and illegal stipulations in a contract are independent and divisible, the latter may be excluded and the former enforced, but when the parties have woven them together in a single agreement, a court of justice will not unravel the good from the bad" (citing numerous authorities).

The case of *Horseman v. Horseman, 43 Oregon, 83 (72 Pac., 698)*, is in point.

In that case the defendant sold and delivered to plaintiff all his interest in all the horses, cattle and real property then owned by the firm of Horseman Bros., composed of the defendant and one of the plaintiffs. The defendant delivered to plaintiffs all his interest in such personal property, and conveyed to them all his interest in the real property, except two quarter sections of land. The consideration for the entire transaction being $4,250.00. One of the parcels which defendant contracted to sell and to afterwards convey, was his government homestead, on which he had not made final proof.

Defendant refused to complete the conveyances or to receive the balance due him on securities taken for the payment of the balance of the purchase price, and the action was commenced for specific performance of the contract.

It was held that the contract to convey the homestead before final proofs were made and patent issued, was void as against the spirit and purpose of the statute which manifested the policy of the government to interdict alienation

by a settler until he had performed upon his part all that is required of him for the acquirement of title; that the illegal stipulation or agreement penetrated and corrupted the whole contract and vitiated it as an entirety.

In *McElyea v. Hayter, 2 Porter (Ala.), 148 (27 Am. Dec., 654)*, it was held that a preemptor's power of attorney to convey land held under the preemption law of May, 1830, as soon as patent has been issued therefor, is void as an attempted evasion of the inhibition of the Act against the transfer of preemption rights before patent issued; therefore conveyance under the power, though after patent, passed no title.

In *McNamara v. Gargett, 68 Mich., 454 (462)*, it was held:

> "If any part of a consideration is illegal, the whole consideration is void because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise, although he may have connected with the act or promise another which is legal."

In a recent case, *LaFrance v. Cullen, 196 Mich., 726*, the Supreme Court of Michigan said:

> "It is established law of this state that if any part of the consideration of a contract is illegal, the whole consideration is void."

Mailhot v. Turner, 157 Mich., 167, was brought on a contract for the lease of two parcels of land with the privilege of purchase, at a sum stated, and the sale of stock of goods. One parcel of the land was the homestead of the lessor and the lease was not signed by his wife as required by the Michigan statute. It was held that the contract was indivisible and being void in part, was entirely void.

The authorities uniformly hold that even though it might be possible to sever the illegal from the legal portion of the contract, yet, if there are no means to ascertain whether the promise was induced by the legal or illegal portion, or

when the consideration is unapportionable and unapportioned, the entire contract will be illegal if one of the elements thereof is immoral or against public policy.

In this case there are no means by which to ascertain whether the promise of the railroad was induced by the legal or illegal portion of the land attempted to be granted.

It is safe to say that the Port Huron & Lake Michigan Railroad Company would not consent to make more than sixty miles of its railroad a land grant road, and subject to all the terms and conditions attached to a land grant railroad, in consideration of the grant of the 6,428.68 acres east of Flint.

The Act of Congress making the grant contemplated a grant of six sections per mile, or 230,400 acres for the sixty miles of road between Port Huron and Flint.

The available land between Port Huron and Flint was about three per cent of the land which the Act of Congress contemplated should be granted, and less than the amount of lands called for by the Act for the construction of two miles of road. The railroad company might be willing, and evidently was willing, to subject sixty miles of their road to the land grant provisions of the Act of Congress and the Michigan legislature in consideration of the grant of 36,000 acres of land, but to hold the railroad to its promise in consideration of the grant of about six thousand acres of land, is to make an entirely different contract than that contemplated by all parties when the illegal contract was entered into.

III.

Not a Land Grant Road.

The railroad between Port Huron and Flint, Michigan, was not constructed in whole or in part by a land grant made by Congress.

In *U. S. v. Alabama G. S. R. Co., 142 U. S., 615 (12 Sup. Ct. Rep., 306)*, Mr. Justice Brown, speaking for the Court, said that the words, "constructed in whole or in part," as used in the land grant statute are susceptible of several constructions. It was pointed out that they may mean such roads as received grants of land, the proceeds of whose sale were sufficient to pay the entire or only the partial cost of their construction, and in that case the language would be confined to the linear parts of such roads as received the aid of land grants; or they may mean that railroads, any linear part of which received the aid of a land grant of Congress in its construction should be bound to carry the mails at a reduced rate over the entire line. A third construction as stated in that case, would be that any railroad, the entire line of which, or only certain linear portions of which, had been constructed by a congressional land grant should receive the reduced rate properly proportioned to the part which had received such aid.

The latter construction was the one that had been applied by the departmental construction as applied to the Alabama Great Southern Railroad, and was adopted by the Court in that case.

The record in this case does not bring the road between Port Huron and Flint within any one of the three constructions.

The lands which it is claimed were received were not sufficient to pay the entire cost of the construction of the railroad, and, in fact, were less than three per cent of the land

described in the congressional grant, and if the congressional grant contemplated that the lands granted were sufficient to construct the roads to which they were to be applied, less than two miles could have been constructed by the six thousand acres which it is claimed were received.

It is not claimed that any linear part of the railroad between Port Huron and Flint was constructed by the aid of a land grant, and if it had been, it would be a great injustice, as pointed out in the Alabama case, to apply the land grant provisions to the entire line between Port Huron and Chicago, or between Port Huron and Flint, when the lands granted were sufficient to construct less than two miles of railroad.

The entire line was not constructed by the aid of a land grant, nor were "certain linear portions thereof," and the land grant provisions could not be applied to the entire road, or any part thereof.

The Act of Congress of June 3, 1856, granted the land "to aid in the construction of railroads" and provided that the lands "shall be held by the State of Michigan for the use and purposes aforesaid." It was also provided that the granted lands "shall be exclusively applied in the construction of that road for and on account of which said lands are hereby granted."

There is no magic in the words, "To aid in the construction of railroads," or "exclusively applied in the construction," or "granted to aid in the construction," etc., in the Act of June 3, 1856. They are as plain and apparent in meaning and purpose as so many pikestaffs would be.

It is clear that they reqnire the lands granted shall aid or be exclusively applied in the construction of the road, help construct it, and they forbid the application of the statutes to a road not so aided or helped in its construction. The word "aid" means to help, assist (Webster). "To construct," is to put together, to build, to form, to make,

and "construction," is the act of building, erection (Webster).

The construction of these words is reinforced by the language of Section four of the Act of June 3, 1856. The lands were to be disposed of only as the work progressed. They should be applied to no other work whatever. The lands were to aid or help the construction. The road so constructed was a land aided or land grant road, and not otherwise.

The Assistant Attorney General for the Postoffice Department has uniformly held the law to be that to constitute a land grant road, within the purview of congressional legislation, it must have been built in whole or in part by the aid of a land grant.

1 Opinions Assistant Attorney General for the Postoffice Department, 777, 875, 879; 2 ibid., 312.

The rulings of the courts are clear and positive.

In *Coler v. Board of Commissioners, 89 Fed., 257*, there was an application for an injunction against the Board of Commissioners and the Treasurer of Stanley County, N. C., to prevent them from using the proceeds of taxes levied and collected for any other purpose than the payment of coupons on bonds issued by the county to pay its subscription to the stock of the company to aid the completion of the Yadkin Railroad Company, which was authorized to construct a railroad from Salisbury to Norwood, in Stanley County (pages 258, 259). The road was built after the subscription to stock and the issue of the bonds (pages 258, 265); the bonds were sold on the open market before maturity page 259), and the county officials refused to pay the coupons on the theory that the bonds had been issued illegally (pages 258, 259, 265, 266).

The state statute construed was Sec. 1696, as follows:

"The boards of commissioners of the several counties shall have power to subscribe stock to any rail-

road company or companies when necessary to *aid in the completion* of any railroad in which the citizens of the county may have an interest" (page 265; italics not in statute).

Judge Simonton said:

"This section gives authority to the county commissioners to subscribe to the stock in any railroad company on the conditions, first, when necessary to aid in its completion; and, second, when the citizens of the county have an interest in it" (page 265).

Again, Judge Simonton said:

"What, then, is the meaning of the words, 'in the completion of'? This word must be used in its ordinary, colloquial sense. In its narrowest signification, the meaning of this word is to carry out something already begun; to fill out something already outlined. In this sense the word will mean, *come to the assistance of a railroad begun or contemplated*, and aid its end—Completing it to its terminus. The clear purpurpose of the section was to prevent a county from undertaking of itself to construct a railroad, *or to subsidize one already completed, and to limit it to aid others who have undertaken the enterprise and to aid them in its completion.* In the term, 'the completion of a railroad,' is involved the selection of the termini, the survey and location of the route, the securing of the right of way, the construction of the roadbed, and the laying and ironing of the track. *Any aid given in any of these stages is aid in the completion of a railway*" (page 266; italics not in original).

Judge Simonton "ordered that the injunction issue as prayed in the bill" (page 266).

This case makes it plain that to "aid in the completion of a railroad," is to aid in the selection of the termini, or in the survey and location of the route, or in the securing of the right of way, or in the construction of the roadbed or

in the laying and ironing of the track, or any of these, and that aid given in any part of these stages is aid "in the completion" of the road. In the case at bar nothing at all was done by means of public lands or public land grants in any of the particulars named. It follows that no aid was given in the construction of the route from Port Huron to Flint.

In *DeGraff v. St. Paul & Pac. R. R. Co., 23 Minn., 144,* there was involved the right of the company to lands granted the state by the United States, Act of Congress, March 3, 1857 (11 Stat., 195), to aid in the construction of railroads in Minnesota.

The Minnesota Act of March 11, 1873, extended to the company "the time for the grading and completion" of its branch lines (page 146). Plaintiff contended that the branch lines had not been completed because the company had not equipped them with the necessary rolling stock, and had not operated them (page 145). The company contended that by constructing the road, without equipping it with rolling stock or operating it, it had become entitled to the lands (page 146).

The Court said:

> "The word 'completing' has substantially the same signification as the word 'constructing.' A railroad is completed or constructed when that is done which is necessary to make it a railroad, when it is fitted for use as a railroad; that is to say, when it is made ready and put in proper condition for the placing and running of regular trains upon it, or for operation as it is usually termed" (page 146).

The court decided in favor of the company (page 153).

This case is noteworthy, first, because the Minnesota Act was predicated on the Act of Congress donating certain lands to Minnesota to aid in the construction of railroads; second, because it is clearly shown that the words "com-

pleting" and "constructing," have the same significance, and that a railroad is completed or constructed when that is done which is necessary to make it a railroad, and it is one when made ready and put in proper condition, for the placing and running of regular trains over it. This was done in the case at bar, December 12, 1871, and the mail route was established January 1, 1872, all these things being done seventeen months before the Governor of the State issued his patent. If that patent would have been effective at all it would have been only to use the language of Judge Simonton, in the case above cited, "to subsidize" a railroad "already completed." The same is true as to the effect of the Act of release passed by Congress in 1879, as we submit. The State of Michigan made a gift to or subsidized a road already completed.

In *Chicago, Milwaukee & St. Paul Railroad Company v. The United States, 14 C. Cls., 125*, the Court held: "That no portion of the claimant's road was constructed in whole or in part by a land grant within the meaning" of the Act stated and, therefore, the Government was not entitled to deduct twenty per cent from the contract price due the claimants for carrying the mails. In other words, the Court inquired (pages 127-134) into the facts for the purpose of ascertaining whether or not any portion of the road was constructed in whole or in part by a land grant, and on reaching that conclusion (pages 140-142, 144), the claimant had judgment.

The case was appealed by all the parties to this Court, where it is reported in *104 U. S., 687-689*. Mr. Justice Matthews wrote the opinion of the Court, and on page 688, he said:

> "The Court of Claims found the company had not been aided in the construction of its road by a land grant, and that it was, therefore, not subject to the deduction from its compensation made on that account."

The opinion then disposed of a question in the case not necessary to consider here, and continues:

"The question in the present case, therefore, whether the railroad of the company was or was not the subject of a land grant, becomes immaterial; although, were it otherwise, we should have no hesitation in affirming the finding of the Court of Claims upon that point, for the reason set forth in its opinion."

It must be established as a fact that the road was land aided in its construction before it can be considered to be what we speak of as a land aided or land grant road. It appears by the Findings of Fact in this case that the road between Port Huron and Flint was not land aided in its construction. In Finding V (R., 20), it appears, "Said railroad was completed and in operation, from Port Huron to Imlay City, and then to Lapeer, in the fall of 1870, and from Port Huron to Flint, on December 12, 1871," and by Finding VI (R., 21, 22) it appears that the attempted grant was made in May, 1873.

As we have already indicated, the land east of Flint was but three per cent of the lands intended to be granted for that portion of the road. In 1876, when the Act of July 12, 1876, Stat. L., page 82, Chap. 179, went into effect, at a time when all the facts were fresh and easily ascertained, the Postoffice Department commenced to treat the road as a nonland grant road, and so continued for thirty-six years. It had been treated as a nonland grant road for twenty-four years when the plaintiff acquired it by purchase, in 1900.

By the Memorial of May 1, 1873, it appears that the Port Huron & Lake Michigan Railroad Company had completed sixty-six miles of the unfinished portion of said line. This was the action which initiated the proceedings which resulted in the patent being granted by Governor Bagley, May 30, 1873. The sixty-six miles had been completed before the land was granted. It had been so far constructed and completed by January 1, 1872, that on that date it commenced to carry the mail under contract with the Postoffice Department.

It is not shown, nor was it attempted to be shown, that

any part of the proceeds of the land aided in the construction of the road, or, in fact, ever reached the railroad company.

IV.

Title Passed in 1881 as Gift or Subsidy.

The Port Huron & Lake Michigan Railroad took title to the lands east of Flint as a gift or subsidy under the Act of the Michigan Legislature, approved June 9, 1881, and not under the patent of May 30, 1873.

The Act of the Michigan Legislature, approved June 9, 1881 (Finding VI; R., 28), is entirely inconsistent with the idea that the title to the lands east of Flint passed by the governor's patent of May 30, 1873.

The Act of 1881 applies only to "such lands as are situated north and south of the railroad constructed from Port Huron to Flint." The Act of Congress of June 3, 1856, the Act of the Michigan Legislature of February 14, 1857, and the Act of the Michigan Legislature of May 14, 1877, all embraced the lands west of Flint as well as those east of Flint. The petition of the Port Huron & Lake Michigan Railroad, November 18, 1871, its Memorial of May 1, 1873, the governor's patent of May 30, 1873, the acceptance of the railroad of May 30, 1873, the conveyances to William R. Bowes, as trustee, all likewise embraced the lands west of Flint, as well as those east of Flint.

If the Port Huron & Lake Michigan Railroad Company took title to the lands east of Flint by the governor's patent in 1873, the Act of 1881 never should have been passed, and the lands east of Flint should have been excepted from the release of Congress by the resolution of March 3, 1879.

By Section one of the Act of June 9, 1881, of the Michigan legislature, the action of the Board of Control of Railroads on the first day of May, 1873, in conferring upon

the Port Huron & Lake Michigan Railroad Company, certain lands granted by the United States to the State of Michigan, June 3, 1856, to aid in the construction of a railroad from Grand Haven and Pere Marquette to Flint, and thence to Port Huron, as to all such lands as are situated north and south of the railroad constructed from Port Huron to Flint, is hereby ratified and confirmed with like force and effect *as if said Board had at the time of its action, due and full authority in that behalf.* This is a clear statement by the Michigan legislature that the Board of Control did not have at the time of making the grant "due and full authority in that behalf."

By Section two of the Act of 1881, all the title of the above described lands acquired by the State of Michigan by the Act of Congress of June 3, 1856, and the subsequent Act of March 3, 1879, to so much of said lands as have been conveyed by said Port Huron & Lake Michigan Railroad Company "is hereby vested" in the grantees of said company, and the rest and residue of said lands is vested in said company, its successors and assigns. It is now claimed by the Government that title passed to the Port Huron & Lake Michigan Railroad Company by the governor's patent of May 30, 1873, and that the United States, therefore, had no interest in the lands east of Flint, to be released by the joint resolution of March 3, 1879, yet, we have the Michigan legislature, in 1881, vesting in Port Huron & Lake Michigan Railroad Company, and its grantees, all the title of the above described lands acquired by the State of Michigan, not only by the Act of Congress of June 3, 1856, but also the title acquired by "the subsequent Act of March 3, 1879."

This Act of the Michigan legislature, approved June 9, 1881, is the direct product of the suggestion of the Supreme Court of Michigan, in the case of *Fenn v. Kinsey, 45 Mich., 446,* decided January 28, 1881, in which it is stated that the Act of 1877, was void legislation and that "it is for the state itself, now that it has plenary power," to act as if there had been nothing done before.

We have, therefore, the legislature of the State of Michi-

gan acting on the suggestion of the Supreme Court of that State in passing the Act of 1881, and that Act was approved by the governor of Michigan, on June 9, 1881.

The highest judicial, legislative and executive authorities of the State of Michigan having concurred in passing title to the lands to the Port Huron & Lake Michigan Railroad, in 1881, as a gift or subsidy, there does not seem to be much room to claim that the title to those lands passed to the railroad company in 1873.

There was no injustice done the United States by this action by the State of Michigan. The objects for which the grant of 1856 had been made had been accomplished. The railroad had been constructed, thus opening a mail route which commenced carrying mails under contract as early as January 1st, 1872. The price of Government lands in the even numbered sections within the place limits had been doubled and the Government had no doubt obtained the benefit of the increased price. That price had been made possible by the construction of the railroad and the lands of private owners no doubt increased in value as well. It would be no advantage to anyone to encourage the construction of a parallel line from Port Huron to Flint and there were no prospects of the lands being needed to encourage the building of any other road. At any rate, the Government, in 1879, released all claims it had to the land and there was no possibility of the United States being injured or defrauded by a disposition of the lands in 1881, which met the approval of all three departments of the state government.

V.

Estoppel.

The appellant is not estopped to claim that there is no valid contract.

The decision of the Court below was placed on the ground of estoppel. It was said:

> "It does not lie in the mouth of the railroad company to say that it only acquired about 6,400 acres out of approximately 36,000 acres asked for, that the consideration for its assumption of the burdens of the land grant Act was entire and indivisible, and that, therefore, it did not assume the burden."

The appellant did not receive the lands. In its chain of title was the foreclosure of the mortgage which cut off the title of the Port Huron & Lake Michigan Railroad Company in all the railroad property before appellant became the owner of the road, October 31, 1900 (Finding V; R., 21).

The reasons given for holding that the Port Huron & Lake Michigan Railroad Company was estopped to say the lands were not lawfully conveyed to it, are, we respectfully submit, unconvincing even as applied to that railroad. It was said, "It sought the conveyance and declared it was entitled to them under the congressional grant." It did not seek the conveyance of the lands east of Flint at any time or in any manner except as it sought the conveyance of all the lands, including those west of Flint." Further, "it accepted the conveyance in terms and proceeded to exercise control and disposition of them." It accepted the conveyance of all the lands "in terms" and proceeded to exercise control and disposition of all of them, and there is no fact in the record to show that it ever exercised control and disposition of the lands east of Flint, as separate from the lands west of Flint.

It is true "a trustee of its appointment was authorized to sell them and that trustee was subsequently made party defendant in the mortgage proceedings, under which the company's properties were sold." That trustee was a trustee of all the lands and the record is barren of any act of that trustee relating to the lands east of Flint, although it does show that he acted as to the lands west of Flint, involved in *Bowes v. Haywood*, and in *Fenn v. Kinsey*.

It was further said, "the lands were not imposed on the railroad company. It asked for them and solemnly accepted the grant as made under the provisions of the Act of Congress and the legislature of the State." The road did not ask for the lands east of Flint at any time when the lands west of Flint were not included, and when it "solemnly accepted the grant," it must be borne in mind that the acceptance was not of 6,400 acres, but of more than 36,000.

We submit that there are here none of the elements of estoppel. There has been no change of position by this claimant, or any of the previous owners of the road, to the detriment of the United States. On the contrary, all of them and the United States, until November 27, 1912, when the Postmaster General made the order described in Finding VII (R., 29, 30), acted on the theory and in the belief that the road between Port Huron and Flint was not a land-aided road. For forty years all the parties concerned, the owning companies and the United States, acted upon a theory, a practice and a construction directly contrary to the view that the road between those points was land-aided. If the doctrine of estoppel is applicable here, it is against the United States alone.

Legal rights are not lost by the silence or inaction of one party that *does not produce a change of position that results injuriously to the other party.* This is a well-settled rule of the law of estoppel.

Jones v. United States, 96 U. S., 24, 29.
Pickard v. Sears, 6 Ad. & El., 469, 474.
Hawes v. Marchant, 1 Curtis C. C., 134, 144.

In *Katchum v. Duncan, 96 U. S., 659, 666,* it was said:

> "An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury and he only can set it up."

In *Dickerson v. Colgrove, 100 U. S., 578, 580,* in speaking of an estoppel *in pais,* the Court said:

> "The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden."

In the instant case none of the roads caused or persuaded the United States to hold that the road was not a land-aided road. On the contrary, the actions of the United States induced this claimant to believe that the road was not land-aided.

A deed having no validity cannot be made the basis of an estoppel.

Banks v. Banks, 101 U. S., 240.
Smythe v. Henry, 41 Fed., 705, 706.
Sims v. Everhardt, 102 U. S., 300.
Drury v. Foster, 2 Wall., 24.

The doctrine of estoppel may be applied against the United States *(Duval v. United States, 25 C. Cls., 46,* and cases cited). This is a well-established rule, and we submit that it applies here.

In *Chic. M. & St. P. R. R. Co. v. United States, 14 C. Cls., 125, and 104 U. S., 687,* Congress granted lands to Wisconsin to aid in building railroads. The lands were subsequently diverted to another purpose, the payment of debts contracted by individuals in a futile attempt to build the road,

Congress passing a statute authorizing the land to be disposed of for the benefit of the individuals. This court held that the United States was estopped from claiming the road to be land-aided (see pages 132-134, 141, 142, *14 C. Cls.)*

As we have already shown in this brief, it was held, in *Coppel v. Hall, 7 Wall., 542,* and *Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S., 227 (28 Sup. Ct. Rep., 280),* that wherever illegality appears, the disclosure is fatal to the case. No consent can neutralize its effect. *A stipulation in the most solemn form to waive the objection* would be tainted of the vice of the original contract and void for the same reason. Wherever the contamination reaches, it destroys.

In *Central Transportation Company v. Pullman Palace Car Co., 139 U. S., 24 (11 Sup. Ct. Rep., 478),* heretofore discussed in this brief, it was held that the performance of a void contract of lease by the lessor and the use of the demised property by the lessee, do not estop the lessee from setting up its invalidity in an action on the contract.

VI.

Departmental Construction.

The Government is bound by the departmental construction extending over forty years.

It was found as a fact that from the time of the establishment of a postal route from Port Huron to Lapeer, in 1871, and the establishment of that route from Port Huron to Flint, in January, 1872, the mails have been carried over the road between Port Huron and Flint by the respective companies owning it, and that during all that time, down to November 27, 1912, the road from Port Huron to Flint, and each and every part thereof, was continuously and uniformly treated by the department in its orders stating the route and its termini, and fixing the pay for carrying the mails, and its distance circulars and contracts for the carry-

ng of mails, and in its full payments without deduction to he various companies for carrying the mails, as a nonland ided or nonland grant road (Finding VIII; R., 30).

It was further found that the War Department had likewise, during the same period, dealt with the various companies owning that road, on the theory that it was not a land aided or land grant road.

These departments, during all those years, practically dealt with the several statutes we have cited or quoted, Federal and State, and applied the facts to them. That long continued and uniform conduct is binding on the departments and the Government now.

In *U. S. v. Alabama G. S. R. Co., 142 U. S., 615 (12 Sup. Ct. Rep., 306)*, this Court, speaking by Mr. Justice Brown, commented with approval on the decision of the Court of Claims in that case *(25 C. Cls., 30)*, where, in the case assumed, the injustice of applying the land grant provisions to the entire road where only ten per cent had been land aided, was pointed out. It was also said that the contemporaneous construction given by the executive department of the Government and continuing for nine years, through six different administrations of that department—a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case—should be considered as decisive in the suit.

It was further said that it is a settled doctrine of the Court that in case of ambiguity, the judicial department will lean in favor of the construction given to the statute by the department charged with the execution of such a statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction, may be prejudiced, and that it was especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such a manner to become retroactive, and to require from him the repayment of moneys to which

he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government.

The injustice of applying the rule contended for in this case is much greater than that pointed out in the case cited.

As already shown, the Port Huron & Lake Michigan Railroad Company got, by the Act of 1881, less than three per cent of the land contemplated by the land grant of 1856, for the sixty miles of road between Port Huron and Flint.

In 1876, when the Act of July 12, 1876, 19 Stat. L., page 82, Chap. 179, went into effect, at a time when all the facts were fresh and easily ascertained, the Postoffice Department commenced to treat the road as a nonland grant road, and so continued for thirty-six years. It had been treated as a nonland grant road for twenty-four years when the plaintiff acquired it by purchase in 1900.

We submit the following propositions of law on the question of departmental construction:

(a) That practical application of the facts and the statutes was, and is, binding on the department and must be maintained here, it being especially objectionable that a construction of statutes, which is favorable to the citizen, should be changed in such a manner as to become retroactive, and to require of him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government, as in the case at bar.

> *U. S. v. Ala. & Great So. R. R. Co., 142 U. S., 615, 621 (affirming 25 C. Cls., 30)*, cited with approval in *Houghton v. Payne, 194 U. S., 88, 89.*

(b) If there be doubt simply as to the soundness of that practical construction, and that is the utmost that can be asserted here by the Government, the action, during so many years, of the department charged with the execution of the statute, should be respected by the Court.

U. S. v. Pinnell, 185 U. S., 236, 243, 244.
McMichael v. Murphy, 197 U. S., 304, 312.

(c) If the statutes are ambiguous or of doubtful import, that practical construction of them was, and is, binding on the department and must be maintained here, the courts looking with disfavor upon any sudden change, such as in the case at bar, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced.

U. S. v. Ala. Great So. R. R. Co., 142 U. S., 615, 621 (affirming 25 Ct. Cls., 30).
Hawley v. Diller, 178 U. S., 476, 488.
Houghton v. Payne, 194 U. S., 88, 99.

(d) The practice of an executive department through a series of years should not be overthrown, unless such practice was *obviously and clearly forbidden* by the language of the statutes under which it proceeded.

Hawley v. Diller, 178 U. S., 476, 488.
Hewitt v. Schultz, 180 U. S., 139, 156, 157.
McMichael v. Murphy, 197 U. S., 304, 312.
U. S. v. Midwest Oil Co., 236 U. S., 459.

(e) If that practical construction of the statutes by the department could be held with reason to be wrong, it can not be said, in view of the language used in them, to be so plainly or palpably wrong as to justify the department, or the Comptroller, or a court, after the lapse of so many years, in holding or adjudging that the department had misconstrued the statutes.

Hewitt v. Schultz, 180 U. S., 139, 156, 157.
Hawley v. Diller, 178 U. S., 476, 488.
McMichael v. Murphy, 197 U. S., 304, 312.

CONCLUSION.

The land grant mail route rate is not applicable to appellant's road unless a valid contract at some time entered into gave the United States the contract right to fix the rate at eighty per centum of the fair and reasonable rates allowed nonland grant roads for the same services.

At no time other than in May, 1873, did the United States, the State of Michigan, and the railroad agree to the same terms and conditions. That attempted contract was illegal and void because of the attempted conveyance of 30,998.76 acres of land west of Owosso, in violation of the trust under which the State of Michigan held title to the lands. The consideration for the railroad's promise to carry mail at rates to be fixed by Congress, was indivisible, and, as part of the consideration was illegal and void, the whole contract was void. It was so treated by all parties. An atttempt, in 1877, to legislate life into the grant failed; Congress released all claim to the land in 1879, and the State legislature, in 1881, acting on the suggestion of the Supreme Court, made a gift of the lands to the Port Huron & Lake Michigan Railroad Company and it grantees.

Appellant became the owner of the road, in October, 1900, and one of the assets acquired with the railroad was a full pay mail contract with the United States.

The joint resolution of Congress, releasing all claim to the railroad land; the action of the Michigan legislature, in the Act of 1881, reciting the lack of authority in the Board of Control and the Governor to make the grant of 1873; the action of the Postoffice Department and the War Department in uniformly and continuously treating the road as a nonland aided road, were all inconsistent with a hidden covenant running with the railroad, asserted for the first time in 1912.

Every fact shown by the record was notice that the road was not a land grant road. It was not, in fact, a land grant road.

Appellant was entitled to full pay under its contract with the Government. It had earned between November 1, 1912, and June 30, 1913, $52,566.87, of which it was deprived by the action of the Postmaster General in reducing the compensation to a land grant basis, and it is entitled to recover that amount in this action.

We have attached hereto blue print, showing lines of railroad involved. The yellow line shows the road in question, between Port Huron and Flint.

Respectfully submitted,

Harrison Geer,
Attorney for Appellant.

L. T. Michener,
P. G. Michener, and
Theo. D. Halpin,
Of Counsel.

BLUEPRINT
TOO
LARGE
FOR
FILMING

In the

Supreme Court of the United States.

October Term, 1918.

No. 152.

THE GRAND TRUNK WESTERN RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

Appeal from the Court of Claims

Appellant's Reply Brief

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 153.

THE GRAND TRUNK WESTERN RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPELLANT'S REPLY BRIEF.

We are not able to cite the pages of the appellee's brief for the reason that we have been using a typewritten copy only.

I.

In the statement of the case by counsel for appellee it is said that the case is for the recovery of "20% additional compensation beyond that which the appellant had been paid for carrying United States mail between Port Huron and Flint." This

is error. The appellant was paid the full amount of non-land grant compensation for carrying the mail from October 1, 1900 to October 31, 1912. A correct statement is set forth in the second paragraph on page 2 of our original brief showing that $50,369.70 of the amount for which suit is brought had been actually paid appellant between October 1, 1900, and October 31, 1912. That amount was deducted by the Postmaster General from the pay of the appellant for the year ending June 30, 1913. The additional amount of $2,007.17, included in the amount for which this action is brought, is the amount deducted from the earned compensation of appellant from November 1, 1912, to June 30, 1913, and because of a reduction in the rate to a land grant basis.

II.

Near the end of the statement of facts by counsel for appellee it is said, "The Postmaster General thereupon reduced the pay of the appellant for the period from November 1, 1912, to June 30, 1915, to $3,783.71 per annum." . . . We suggest that the word "to" was used by mistake for the word "by." The latter word would make the statement correct.

III.

In stating the "contention of the parties," counsel for appellee says that appellant contends that it got title only to the lands lying east of Flint." This is error. We contend that the Port Huron and Lake Michigan Railroad Company did not get title to the lands east of Flint at any time prior to the passage

of the Michigan Act of 1881, or in any manner than through the provisions of that act.

IV.

In their statement of "contentions," counsel for appellee assert that appellant contends that the railroad between Port Huron and Flint was not land aided, first, "because the value of the land granted was insufficient to pay the cost of constructing it." This is error. Appellant has not so contended. We contend that the road was not land aided, but do not assign such a reason as the one above quoted.

V.

In the first part of appellee's law argument, and also in title A, it is contended that the Port Huron and Lake Michigan Railroad Company did not intend, May 1, 1873, to build a road from Grand Haven to Owosso, and counsel draws certain conclusions from that statement.

The following is a full statement of the transaction between that company and the Board of Control.

The railroad company November 18, 1871, made a representation to the Board of Control, but nothing came of it, the Board doubting its right to transfer the lands (Finding VI, R. 21). So the subject rested until May 1, 1873, when the petition of the railroad company was presented to the Board. That petition, or memorial (Finding VI, R. 21), makes no representation whatever, except that it had "completed sixty-six miles of the unfinished portion of said line" (R. 22). The resolution of the Board (near middle of R. 24) says:

> "And whereas the said Port Huron and Lake Michigan Railroad Company are engaged in constructing and completing a railroad which with its connections will form a continuous line from Grand Haven to Flint and thence to Port Huron." . . .

These statements do not show that the company tried to deceive the Board or that the Board was misled.

The statement in the above resolution that the railroad company was engaged in constructing and completing a railroad which *with its connections* would form a continuous line from Grand Haven to Flint and thence to Port Huron, as required by the Act of Congress, was true.

It appears by Finding V (R. 20) that May 1, 1869, the Port Huron and Lake Michigan Railroad Company mortgaged its line of railroad from Port Huron, through Lapeer and Flint to Lansing. It also appears from the same finding that, July 30, 1873, that company was duly consolidated with the Peninsular Railroad Company, whose line of road extended from Lansing, Michigan, to Valparaiso, Indiana, under the corporate name of the Chicago and Lake Huron Railroad Company, for the purpose of constructing, maintaining and operating a railroad from Port Huron, Michigan, to Chicago, Illinois. At that time the line between Flint and Lansing was uncompleted.

In 1874 the Chicago and Northwestern Railroad Company was organized for the purpose of completing the gap between Flint and Lansing and utilizing the work already done. The railroad between Flint and Lansing was completed on or about January 1, 1877 (R. 20).

It thus appears that at the time of the action of the Board of Control, in 1873, in attempting to grant the land, the proposed line of the Port Huron and Lake Michigan Railroad Company extended westward from Flint to Lansing, and that that line would of necessity intersect at some point the line of railroad already constructed and completed from Detroit through Owosso to Grand Haven. (See map at end of our original brief.) This is what the Board of Control had in mind when it stated in the resolution (R. 24) that the Port Huron and Lake Michigan Railroad Company was engaged in constructing and completing a railroad which *with its connections* would form a continuous line from Grand Haven to Flint and thence to Port Huron, as required by the Act of Congress.

That purpose was realized on or about January 1, 1877 (R. 20), when the gap between Flint and Lansing was completed, the connection being at Durand with the line running from Detroit to Grand Haven through Owosso. (See our map.)

VI.

In title A, first part of appellee's argument, it is claimed that the State of Michigan could have sold these lands and itself built the road. The State did nothing of the kind and so the question is purely academic.

As to another contention in this title, we submit that the Act of Congress of 1856, section 1, expressly enacted in its second proviso that the lands "shall be disposed of only as the work progresses, and shall be applied to no other purpose whatso-

ever," and section 4 enacted "that the lands hereby granted to said State shall be disposed of by said State only in manner following." That section then specifies the details of such disposition as the work progresses in length of twenty miles at a time, "and so from time to time until said roads are completed."

VII.

Appellee's first part of law argument, title B, argues that it is immaterial that the value of the land actually received by appellant's predecessor in title was less than the cost of constructing the road.

Appellant has made no such claim or contention, nor has it contended that less than two miles of road could have been constructed with the proceeds of the lands available in aid of the construction of the sixty-six miles. (See our original brief, page 50.)

VIII.

In the first part of its law argument, title C, appellee contends that the railroad company took title to the lands east of Flint under the patent of May 30, 1873, not under the Act of June 9, 1881.

We submit that section 2 of the Michigan Act of June 9, 1881, should not be so construed. Its language is plain and positive (R. 9). It was based on the theory of law that it was then *vesting* the title the State had acquired, not only under the Act of 1856, but "the subsequent Act of March 3d," 1879. This subject is discussed on pages 58-60 of our original brief.

IX.

In the third part of the appellee's law argument it is contended that the contract to carry the mails at reduced rates is not unenforcible because part of the consideration received for such promise was illegal.

That contention is based on the theory that the State authorities were persuaded by the company and so attempted to do what "they had no power to do and failed."

We submit that the court below did not find that the State authorities were deceived; neither did it find that the United States or the State of Michigan was defrauded. As we have already pointed out, the Port Huron and Lake Michigan Railroad Company proposed to extend its line from Flint to Lansing. That portion of the line was actually completed by January 1, 1877, thus completing the road *which, with its connections,* made a continuous line from Grand Haven to Flint and thence to Port Huron. It is a matter of no consequence that the connection of the two lines was at Durand rather than at Owosso. The Michigan Act contemplated that there should be two lines.

The illegality consisted in applying the lands appropriated to the construction of a line from Grand Haven to Owosso to a railroad other than one between those points. This was expressly forbidden in unmistakable language by the Act of Congress of 1856 and by the Michigan Act of 1857 as well. It was not a case of a mere want of power, but was

clearly a violation of the Act of Congress, which "was a law as well as a grant."

Appellee's counsel contends that it is an "elementary principle that where the parties to an illegal contract are not in *pari delecto* the innocent party may enforce it against the guilty one."

We submit that there is no such rule of law. If the contract is illegal it is no contract and is not enforcible by either party.

In some circumstances the innocent party may recover what he has paid or parted with, but the action would be in disaffirmance of the contract, not on the contract itself. (See our original brief, pages 41-46.)

X.

The third part of the appellee's argument is on the subject of estoppel and is in response to our argument on pages 61-64, original brief.

Appellee relies largely on a quotation from the opinion of the court below. That court failed to consider these most important facts then known to appellant:

1. When appellant acquired this road in October, 1900, the contract for carrying the mails was with the Chicago and Grand Trunk Ry. Co. (R. 29). January 24, 1901, the Postmaster General issued the following order:

> "Order No. 2405, Chicago & Grand Trunk Ry. Co., $105,210.64; 137,039—Port Huron, Michigan-Chicago, Ill. . . . Recognize the Grand Trunk Western Ry. Co. as being entitled to compensation due or to become due for services performed on route 137,039

in accordance with the relinquishment submitted."

That order was for full compensation; there was nothing in it about land grant rate compensation.

2. That the Postmaster General, beginning with 1883, each year in his report to Congress had not named the route from Port Huron to Flint as land aided.

3. That from January, 1872, to the time of the purchase of the road the War Department and the Post Office Department had continuously and uniformly dealt with and construed the various companies owning that road as non-land aided.

The United States was in all the period named and in those most conclusive ways holding out this as a non-land aided road, and this appellant had the right to rely on those records. The United States, because of those records, as well as for other considerations, is estopped to claim otherwise.

The findings show (R. 20, 21) that the Port Huron and Lake Michigan Railroad Company, May 1, 1869, executed a mortgage on its line from Port Huron through Lapeer and Flint to Lansing, which mortgage was foreclosed and the road was sold in June, 1879, and thereby the title became vested in the Northwestern Grand Trunk Railway Company. "Subsequent consolidations were made until October 31, 1900," and this appellant "became the owner of the road between Port Huron and Flint" (R. 21, foot of Finding V). Thus it appears that more than twenty-one years after the foreclosure sale in 1879, this appellant through consolidations became the owner of the road, and during all that time that part

of the road was treated by the two departments and construed by them as non land-aided.

There is nothing in this record that puts on this appellant or its officers any knowledge of or responsibility for the alleged wrongful acts of the Port Huron and Lake Michigan, and so appellant stands here as having innocently acquired the title to the road between Port Huron and Flint, and is not estopped from setting up the illegality of the transaction on which the appellee bases its action in making the deductions complained of.

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INDEX.

AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE GRAND TRUNK WESTERN RAILWAY Company, appellant, *v.* THE UNITED STATES. } No. 153.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The appellant as the owner of a railroad from Port Huron to Flint, in the State of Michigan, brought suit in the Court of Claims to recover $52,566.87, representing 20 per cent additional compensation beyond that which the appellant had been paid for carrying United States mail between Port Huron and Flint. The appellant's suit rests upon the claim that the construction of its road between Port Huron and Flint had not been aided by a land grant from the United States and that consequently it was under no obligations to carry the mails at 80 per cent of the compensation allowed other roads. The Court of Claims dismissed the suit and the company appealed.

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THE FACTS.

By the act of June 3, 1856 (11 Stat. 21), Congress granted to the State of Michigan to aid in the construction of certain railroads, one of which was described generally as from Grand Haven to Flint and thence to Port Huron, all in the State of Michigan, every alternate section of land designated by odd numbers for six sections in width on each side of the said road, with provisions for making up any deficiency caused by land having been previously sold or otherwise appropriated, and with the further proviso that "the lands hereby granted shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever." (Sec. 1.)

The act further provided that the lands granted should be disposed of by the State only in the manner following:

> That a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid and included within a continuous length

> of twenty miles of each of such roads, may be sold; and so from time to time until said roads are completed; and if any of said roads is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States. (Sec. 4.)

The act also provided that the United States mails should be carried over said roads at such price as Congress might by law direct. (Sec. 5.) (R. 14–15.)

Subsequently it was provided by section 13 of the act of July 12, 1876 (19 Stat. 78):

> The railroad companies whose railroad was constructed in whole or in part by land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only 80 per centum of the compensation authorized by this act. (R. 18.)

The State of Michigan, by the act of February 14, 1857, accepted the grant with the restrictions and upon the terms and conditions contained in the act of Congress, and designated two railroad companies to whom the lands pertaining to the route from Grand Haven to Flint and thence to Port Huron were granted to aid in the construction of their roads, namely, the Detroit and Milwaukee Railway Company to have the lands attaching to the route from Grand Haven to Owosso, and the Port Huron & Milwaukee Railway Company to have the lands pertaining to the route from Owosso to Flint and thence to Port Huron. One of the conditions on which these lands were granted to the railroad com-

panies was that the United States mails should be transported over the roads at such prices as Congress might by law direct. (R. 15–18.)

These grants were, on August 26, 1857, declared forfeited by the board of control of the State of Michigan in the exercise of the powers vested in it by the act of February 14, 1857, because of the failure of these roads to accept the grant. (R. 18.) Later, however, the Port Huron and Milwaukee Railway Company filed its map of definite location in the office of the Secretary of the Interior. On June 3, 1863, the latter certified to the Governor of Michigan 30,998$\frac{44}{100}$ acres of land lying west of Flint for the Detroit and Milwaukee Railway Company. On November 1, 1864, he certified 6,428$\frac{44}{100}$ acres for the Port Huron and Milwaukee Railway Company. The lands last mentioned lay to the north and south of the railroad afterwards constructed between Port Huron and Flint and, with the exception of about 97 acres, were east of Flint.

The Port Huron and Milwaukee Railway Company acquired the right of way for its proposed road from Port Huron to Flint and commenced the work of constructing the road, but its properties were soon sold under foreclosure proceedings and finally came into the ownership of the Port Huron and Lake Michigan Railroad Company, which built the road from Port Huron to Flint, completing it and having it in operation on December 12, 1871. (R. 19–20.)

On November 18, 1871, that is, a few weeks prior to the actual completion of the road from Port Huron

to Flint, the Port Huron and Lake Michigan Railroad Company, through its officers and agents, appeared before the Board of Control and asked that the 30,998$\frac{44}{100}$ acres which had been previously certified by the Secretary of the Interior to the Governor of Michigan for the Detroit and Milwaukee Railway Company, and the 6,426$\frac{44}{100}$ acres which had been certified for the Port Huron and Milwaukee Railway Company be conferred upon it for the purpose of aiding it in the construction of its railroad, which was described as extending from Grand Haven to Flint and thence to Port Huron and as being uncompleted. No action was taken by the board at that time, and on May 1, 1873, the company renewed its request. (R. 21.) On that date the board passed certain resolutions which, after setting forth the history of the grant as hereinabove stated, proceeded as follows:

> And whereas the said Port Huron and Lake Michigan Railroad Company are *engaged in constructing and completing a railroad* which, with its connections, will form a continuous line from Grand Haven to Flint and thence to Port Huron in said State of Michigan, as required by said act of Congress, and is the only company applying for said lands; now, therefore
>
> *Resolved*, That the Board of Control of Railroad Lands for the State of Michigan, by virtue of the powers in them vested, do hereby designate the said Port Huron and Lake Michigan Railroad Company as the proper company

> to receive said grant, and they do therefore hereby release to and confer upon said Port Huron and Lake Michigan Railroad Company, their successors and assigns, all and every the right, title, and interest which now remains in said State of Michigan in and to said lands, be the same more or less, for the purpose of constructing and completing their said road. (R. 24.)

On May 30, 1873, the governor of the State of Michigan, for the purpose of giving effect to the resolutions of the board of control, issued a patent to the Port Huron and Lake Michigan Railroad Company, releasing to and conferring upon it all the interest "which now remains in or which may at any time hereafter for the purposes contemplated by said act of Congress accrue to the said State of Michigan in and to said lands referred to and described in said resolutions of said board of control of railroads for the purpose of constructing or aiding in constructing and completing their said road." (R. 25.) The lands referred to in this deed were the $36{,}731\frac{74}{100}$ acres which had been certified by the Secretary of the Interior to the governor of Michigan for the Detroit and Milwaukee and the Port Huron and Milwaukee Railway Companies. (R. 26.)

Said grant of lands was duly accepted by said Port Huron and Lake Michigan Railroad Company on May 30, 1873, by the unanimous vote of its board of directors, the resolution of acceptance specifically declaring that:

> Said railroad company does hereby assent and agree to the provisions and requirements

of the acts of the Legislature of the said State of Michigan and the said act of Congress before referred to. (R. 26.)

At a meeting of the board of directors of said Port Huron and Lake Michigan Railroad Company held May 13, 1873, William L. Bancroft and Edgar White were duly appointed to take such measures as to them seemed best for the sale and disposition of the lands granted by Congress to the State of Michigan in aid of the construction of the line of railroad from Grand Haven to Flint and thence to Port Huron and by said State conveyed to said company, and they were authorized to appoint an agent or agents to execute under the corporate seal of said company deeds of conveyance to said lands. Subsequently said Bancroft and White selected one William R. Bowes as agent or trustee in trust to sell and convey the lands referred to for said company, and a deed of conveyance of said lands in trust was thereupon made to him. On July 30, 1873, by a meeting of the board of directors of said Port Huron and Lake Michigan Railroad Company, the action of said Bancroft and White in the selection of said Bowes and the execution of the deed of trust to him was duly approved.

Under date of April 13, 1874, the governor of Michigan certified to the Secretary of the Interior the completion of sixty miles of railroad between Port Huron and Flint by said Port Huron and Lake Michigan Railroad Company.

Some litigation having arisen between the trustee appointed by the railroad to handle and dispose of the lands for it and another claiming a part of the lands west of Owosso, the case went to the Supreme Court of Michigan. The court below having found that there was no evidence, claim, or pretense that the Port Huron and Lake Michigan Railroad Company contemplated building any road on the route from Grand Haven to Owosso, the Supreme Court held that the act of February 14, 1857, did not authorize the State Board of Control to grant lands lying on the route from Grand Haven to Owosso for the construction of a road east of Owosso; consequently, the attempted grant of the lands west of Owosso to said company was void. (*Bowes* v. *Haywood*, 35 Mich. 241, decided in January, 1877.)

On May 14, 1877, the Legislature of Michigan passed an act ratifying and confirming the actions of the board of control and the governor, on May 1 and May 30, 1873, respectively, in granting said lands to the Port Huron and Lake Michigan Railroad Company and making the grant effective from its date. (R. 27.)

On March 3, 1879, Congress, by joint resolution, released to the State of Michigan any and all reversionary interest which might remain in the United States in such of the lands granted by the act of June 3, 1856, as were granted to aid the construction of the road from Grand Haven to Flint and thence to Port Huron. It was declared that—

> This release shall not in any manner affect any legal or equitable rights in said lands

which have been acquired, but all such rights shall be and remain unimpaired. (20 Stat. 490.)

Thereafter another case arose wherein the Supreme Court of Michigan adhered to its ruling in *Bowes* v. *Haywood*, *supra*, and held that the State itself had no power, under the act of June 3, 1856, to grant lands lying west of Owosso to the Port Huron and Lake Michigan Railroad Company; that therefore the act of May 14, 1877, was unconstitutional, and that the grant of lands west of Owosso was not validated either by it or by the act of Congress of March 3, 1879. (*Fenn* v. *Kinsey*, 45 Mich. 446, decided in January, 1881.)

On June 9, 1881, the Legislature of Michigan passed an act confirming the action of the Board of control and the governor, taken in 1873, in conveying the lands east of Flint to the Port Huron and Lake Michigan Railroad Company, its successors or assigns, "with like force and effect as if said board had, at the time of its action, due and full authority in that behalf." (R. 28.)

In the meantime a bill in equity had been filed to foreclose a mortgage which had been executed by the Port Huron and Lake Michigan Railroad Company, to which foreclosure suit William R. Bowes, the trustee of the company for the purpose of selling the lands granted to it in aid of the construction of its road, was made a party defendant. The title and ownership of the appellant in the road from Port Huron to Flint was derived through these foreclosure

proceedings and subsequent consolidations with other lines of railroad. (R. 20–21.)

From the time of the establishment of a postal route from Port Huron to Flint in January, 1872, until the end of 1912, that road was treated by the Post Office and War Departments as a nonland-grant road. But on March 29, 1912, the Comptroller of the Treasury rendered a decision holding that it was a land-grant road, and, because of that ruling, the Postmaster General on December 28, 1912, restated and reduced the amount of which appellant had been stated to be entitled by the readjustment orders issued by the Post Office Department since January, 1901, so as to provide pay on a land-grant basis. The Postmaster General reduced the pay of the appellant for the period from November 1, 1912, to June 30, 1915, by $3,783.71 per annum, and deducted $50,359.70 for overpayment from October 1, 1900, to October 31, 1912, from the pay of the appellant for the year ending June 30, 1913. Appellant thereupon brought this suit to recover the sum of $52,566.87, which it claims to be due it for the transportation of the mails from November 1, 1912, to June 30, 1913. (R. 29–31.)

THE CONTENTIONS OF THE PARTIES.

Appellant contends that the obligation of a land-aided railroad to carry the mails at eighty per cent of the compensation allowed by law to nonland-grant roads is contractual in its nature, and that in this case it is not enforcible because the consideration for its

promise received by it from the United States was in part illegal. That conclusion is reached by the following line of reason: The Port Huron and Lake Michigan Railroad Company applied to the Board of Control of the State of Michigan for the grant of all the lands lying along the line of the proposed route from Grand Haven to Port Huron, those to the west as well as those to the east of Owosso, totaling over 36,000 acres. Subsequently it was decided that the grant was void as to the 30,000 acres west of Owosso and that the company got title only to the lands lying to the east of Owosso. The company would not have been willing to undertake the obligations of a land-grant road had it known that it could obtain title only to the lands east of Owosso. The contract was, therefore, indivisible, and, since it was illegal in part, it is not enforcible as to the part which is legal.

The Government denies that the contract was either illegal or indivisible. It contends that under the act of Congress of June 3, 1856, and the Michigan act of February 14, 1857, the lands granted to the Port Huron and Lake Michigan Railroad Company could be disposed of (except as to the first 120 sections) only at the rate of 120 sections of land for each twenty miles of road built, if there was that much land undisposed of within the limits of the grant; that the obligation of the grantee to carry the mails at such prices as Congress might direct attached only to those twenty-mile sections in respect of which the grantee had actually received

the land granted; and that a separate contract was entered into as to each twenty-mile section. In this case the obligation to carry the mails at eighty per cent of the regular rates was enforced only with regard to the sixty miles from Flint to Port Huron, and as to those sixty miles the company had actually received all of the lands within the limits of the grant.

The Government contends further that even if the contract is indivisible and in part illegal, the rule that on such a contract no recovery can be had applies only where the parties are *in pari delicto* and not in favor of a party who has been guilty of the wrongdoing as against one who is entirely innocent. The appellant stands in the shoes of the Port Huron and Lake Michigan Railroad Company. That company procured the grant to it of all the lands lying along the line of the road from Port Huron to Grand Haven on the representation that it intended to complete its line from Flint to Grand Haven whereas in reality it had no intention of doing so; neither the United States nor the State officials which acted as its agents in making the grant knew of the railroad's fraudulent intent; therefore if there was any illegality it was solely on the part of the railroad company. Since that company knew that it was not entitled to the lands west of Owosso, neither it nor its successors in interest can set up that it would not have accepted a grant of those lands east of Owosso only, and that, therefore, the contract is indivisible.

The Government insists that the grant was not illegal, but merely void in part, there being nothing

illegal in the innocent attempt of the State authorities to convey lands which they had no power to convey.

The appellant contends further that the railroad between Port Huron and Flint was not land aided, first, because the value of the land granted was insufficient to pay the cost of constructing it; second, because the grant was not made until it was completed and in operation; and third, because the Port Huron and Lake Michigan Railroad Company took title to the lands east of Flint as a gift or subsidy under the act of the Michigan Legislature of June 9, 1881, and not under the patent of May 30, 1873.

To these contentions the Government replies, first, that the fact that the lands granted the Port Huron and Lake Michigan Railroad Company were not equal in value to the cost of constructing the road from Port Huron to Flint was immaterial; second, that that road having induced the State officials to confer upon it the lands in question for the purpose of aiding it in the construction of its railroad which was fraudulently represented as extending from Grand Haven to Flint and thence to Port Huron, and as being uncompleted, knowing or with ample opportunity for knowing the value of the lands which the State authorities had power to confer in aid of the construction of the road from Port Huron to Flint, and having accepted the lands with knowledge of the conditions on which they were granted, was estopped to deny that this road was land aided, and appellant is bound by the acts of its predecessors in title; third, the Government denies that the Port Huron and Lake Michigan Railroad

company took title to the lands east of Flint under the act of June 9, 1881.

Appellant contends finally that the Government having treated the road for forty years as a nonland grant road is estopped now to treat it as land aided.

The Government replies that its conduct in treating the road as a nonland grant road was not the construction of a statute but merely a mistake of fact, and that the Government is not bound by it.

THE ISSUES.

The questions to be decided are as follows:

1. Is appellant's road from Port Huron to Flint land aided?

2. Assuming that the road is land aided, is appellant's promise to carry the mails at such price as Congress may direct unenforcible because the consideration received for it was in part illegal?

3. Is the Government estopped by its previous treatment of the road as a nonland grant road to now treat it as land aided?

I.

APPELLANT'S ROAD FROM PORT HURON TO FLINT IS LAND AIDED.

The Port Huron and Lake Michigan Railroad Company on November 18, 1871, requested the Board of Control of the State of Michigan to confer upon it, for the purpose of aiding it in the construction of its road from Grand Haven to Port Huron, which was represented as then being in process of

construction, lands which had been previously certified by the Secretary of the Interior for the Detroit and Milwaukee and the Port Huron and Milwaukee Railway Companies, aggregating 36,731.73 acres. The request was renewed on May 1, 1873 and was granted by the Board in the belief that the company contemplated building a road from Grand Haven to Owosso. As a matter of fact, the company had no such intention and the grant to it of the lands west of Owosso was, on that account, held void by the Supreme Court of the State of Michigan.

But the company's title to the lands east of Owosso has never been questioned. It exercised ownership and control over these lands, sold them and retained the proceeds. It accepted them with knowledge of the fact that one of the conditions on which they were granted was that it must carry the United States mails over that portion of its road aided by the grant at such price as Congress might by law direct. It knew that it was not entitled to the lands west of Owosso, and that the attempt to confer them upon it had been induced by its fraudulent misrepresentation of the facts. It knew, or had the means of knowing, the exact quantity, location, and value of the lands to which it was entitled.

By accepting the land under these circumstances it entered into a valid contract to convey the United States mails over its road from Port Huron to Flint at such price as Congress might by law direct. It could not at the same time retain all the benefits of the contract and repudiate its obligations under it.

Appellant, having derived title to the road from that company, is in no better position. It is true that there is no evidence to show that it ever got title to the lands, but that is immaterial since it is not denied that the Port Huron and Lake Michigan Railroad Company got title to them. The obligation to carry the mails over portions of its road aided by the grant at such price as Congress might direct extends not only to the original land-aided company, but to any other company carrying mails over such road, although such company itself received no land-grant aid. *Chicago, St. Paul, etc., Railway Company* v. *United States*, 217 U. S. 180.

A. It is immaterial that at the time the Port Huron and Lake Michigan Railroad Company received the land grant its road from Port Huron to Flint had been completed.

The appellant contends that, because the grant of lands in question was not made until the road for and on account of which the lands were granted had been completed, such a road was not "constructed in whole or in part by land grant" within the meaning of section 13 of the act of July 12, 1876. It bases that contention upon the ground that the provision of section 1 of the act of June 3, 1856, that the lands were granted to aid in the construction of certain railroads and that "the lands hereby granted shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted" necessarily implied that the road must still be in process of construction when the lands are conveyed to it, and hence the State had no

power to confer a grant of land on a company whose road had already been constructed.

This contention is clearly unsound. When Congress made the grant of June 3, 1856, it contemplated that the State would sell the lands granted and use the proceeds for the purpose of constructing the roads designated in the act. The restrictions of section 4 on the manner in which it should dispose of the lands granted were designed to insure the application of the proceeds of the sale of lands to the construction of the roads and their completion within a reasonable time. To that end its right to sell lands granted it was, except as to the initial 120 sections, made to depend upon proof that 20 continuous miles of road had been completed for each 120 sections of land disposed of, and that if any road was not completed within 10 years no further sales should be made and the lands unsold should revert to the United States.

But except in the particulars stated the discretion of the State as to the manner in which the road should be built and the lands disposed of was unrestricted. If the State chose to advance the cost of constructing the road or any part thereof out of its own funds it would not lose the right thereafter to sell 120 sections for each 20 continuous miles of road built and reimburse itself out of the proceeds. In the present instance the State, instead of itself selling the lands and building the roads with the proceeds of the sales, adopted the policy of allotting them to designated railroad companies and letting them have the lands

as they earned them. This manner of disposing of the lands was neither expressly nor impliedly prohibited. And since the State could have built the road from Port Huron to Flint out of its own funds and sold the lands granted on account of this 60 miles of road to reimburse itself, it could convey them to the railroad company which had already built the road for the purpose of reimbursing it.

In this case the Port Huron and Lake Michigan Railroad Company expressly requested that the lands in question be conferred upon it *for the purpose of aiding it in the construction of its railroad*, held itself out as being entitled to them under the act of Congress of June 3, 1856, and induced the State board of control to make the grant upon the express representation that it was engaged in the construction of a road to Grand Haven which had not been completed. The resolutions of the board conferring the lands on the company and the governor's patent both recited that the grant was made "*for the purpose of constructing and completing their said road.*" The company in accepting the grant expressly assented to the requirements of the State and Federal acts with knowledge of the fact that the State officials had no power to grant the lands except for the purpose of constructing the road. It appointed a trustee to sell the lands, who was subsequently made a party defendant in the mortgage foreclosure proceedings under which the company's property was sold. Having actually received and retained the full benefit of the grant under these circumstances, the company was estopped

to deny that the State officials were authorized by the act of June 3, 1856, to convey the lands to it. And whether they were authorized under the Michigan act of February 14, 1857, to do so is immaterial in view of the act of May 14, 1877, ratifying the grant.

B. It is immaterial that the value of the land actually received by appellant's predecessor in title on account of its road from Port Huron to Flint was less than the cost of constructing that road.

This clearly follows from what has already been said. Except as to the first 120 sections the right of the State to sell the lands granted it was made dependent upon proof that 20 miles of road had been completed for each 120 sections of land disposed of. Though the proceeds of the sale of the first 120 sections might be insufficient to pay the cost of constructing 20 miles of road, the State could not dispose of another acre of land until it, or, in the case at bar, the company upon whom the grant had been conferred, completed the construction of 20 miles of road with its own funds. And the obligation to carry the mails at such price as Congress might direct attached to each 20 miles of road on account of whose construction the company had received any land whatever regardless of whether or not the value of the land was equal to the cost of construction.

This construction is supported by the decision of the Assistant Attorney General for the Post Office Department, who, in construing section 13 of the act of July 12, 1876, held as early as November 15, 1877 (1 Op. 328), that a railroad is land aided although the value received by it is out of proportion to the

extent of the obligations imposed. Such a contemporaneous construction by the department of the Government charged with its execution, which does not appear ever to have been changed, should be considered decisive.

The question here raised does not appear ever to have been passed upon by the courts. In *United States* v. *Alabama Great Southern Railway Company*, 142 U. S. 615, this court held merely that a railroad company is obliged to carry United States mails at land-grant rates only over those portions of its road which have been constructed by the aid of a congressional land grant. The question whether any portion of its road should be regarded as land aided, although the value of the land received on account thereof was not equal to the cost of constructing it, was not raised. The court in that case sustained the construction which had been put upon section 13 of the act of July 12, 1876, by the Post Office Department contemporaneously with the ruling of the Assistant Attorney General for the Post Office Department above referred to. Clearly there is no inconsistency between that ruling and the decision in the case of *United States* v. *Alabama Great Southern Railway Company*.

By making to the railroad company a grant of the odd numbered sections of land for six sections in width on each side of the road, the Government did not guarantee that the company would ever actually get that amount of land. The exceptions named in section 1 of the act clearly show that the company

was to get only the quantity of land ultimately found to be covered by the grant. *Sioux City, etc., Railway Co.* v. *United States*, 159 U. S. 349. Before the company applied for the grant the Secretary of the Interior had certified to the governor of the State the lands, title to which could pass under the grant. The company knew or had the means of knowing the exact quantity, location, and value of the lands offered to it. It knew, moreover, on what conditions they were offered it. Whether the consideration offered was adequate was a question for the company alone to decide. Having accepted the offer it can not be heard now to say that it should not be held to a bargain which has turned out to be disadvantageous to it.

C. The Port Huron and Lake Michigan Railroad Company took title to the lands to the east of Flint under the patent of May 30, 1873, not under the act of June 9, 1881.

When the act of June 9, 1881, is construed in the light of the situation existing at that time there can be no doubt that the purpose and effect of that act was not to make a new grant, but to remove all possible doubt as to the validity of an old one. The State authorities had attempted to confer upon the Port Huron and Lake Michigan Railroad Company title to all the lands which had been granted by the act of June 3, 1856, to aid in the construction of a railroad from Grand Haven to Flint and thence to Port Huron. As to the lands east of Owosso the validity of that grant had never been questioned. But it had been held

by the Supreme Court of Michigan that the railroad company had never contemplated building any road from Grand Haven to Owosso, and that consequently the State authorities had no power under the Michigan act of February 14, 1857, to confer upon it the lands west of Owosso, and that the attempted grant of those lands was void. *Bowes* v. *Haywood*, 35 Michigan, 241. After that decision the act of May 14, 1877, was passed ratifying and confirming the action of the board of control and the governor of Michigan on May 1 and 30, 1873, respectively, and granting said lands to the Port Huron and Lake Michigan Railroad Company and making that grant effective from its date. The court having held in *Bowes* v. *Haywood* that the act of February 14, 1857, had not conferred upon the board power to make the grant the act of May 14, 1877, was quite obviously passed in the belief that its effect would be to confer on the board the power which theretofore had been lacking.

But apparently some doubt was entertained as to the power of the State itself to dispose of the lands west of Owosso in this way under the act of June 3, 1856. That act provided that the power to sell lands granted in aid of the construction of the road from Port Huron to Grand Haven should cease if that road was not completed within 10 years from the date of the act, and that all unsold lands should revert to the United States. That road had not been completed within 10 years from the date of the act. Therefore the United States still had the

right, on March 3, 1879, to declare the grant forfeited as to the lands undisposed of. This right could not be cut off by any action of the State. To enable the State and its grantees to convey good title to the lands it was apparently thought necessary that the United States relinquish its right to declare the grant forfeited.

Accordingly on that date Congress passed an act releasing to the State of Michigan the reversionary interest which it might have in such of the lands granted to the State of Michigan by the act of June 3, 1856, and certified to it in accordance with said act as were granted to aid the construction of the road from Grand Haven to Flint and thence to Port Huron. Obviously this act was not intended to and could not affect the title of the Port Huron & Lake Michigan Railroad Co. and its grantees to the lands east of Owosso. That these lands had been disposed of in accordance with the provisions of Federal and State laws is not open to question and had never been questioned. The United States had no reversionary interest in them which it could release. The title to them was therefore not affected in any way by the act of March 3, 1879. Out of abundant precaution the resolution provided:

> This release shall not in any manner affect any legal or equitable rights in said lands which have been acquired but all such rights shall be and remain unimpaired.

Even were it not otherwise clear that the act was not intended to affect the title to the lands east of

Owosso, this provision would be conclusive on that point.

After the passage of this act the Supreme Court of Michigan held that under the act of June 3, 1856, the State itself had no power to grant the lands west of Owosso to the Port Huron & Lake Michigan Railroad Company; that therefore the act of May 14, 1877, was unconstitutional and did not validate the grant of May, 1873, of the lands west of Owosso. The court also held that the release by the act of March 3, 1879, of the United States' reversionary interest in these lands did not make the grant valid because the absence of power on the part of the State to pass the act of May 14, 1877, at the time of its passage could not be cured by the subsequent Federal legislation. But the court said that since the passage of the act of Congress of March 3, 1879, the State had plenary power to dispose of the lands and to act as if there had been nothing done before.

This decision and all of the previous history above recited related exclusively to the lands west of Owosso. The Michigan act of June 9, 1881, related exclusively to the lands east of Owosso. It is clear therefore that this act was not, as stated in appellant's brief, page 59, the product of the suggestion of the Supreme Court of Michigan in the case of *Fenn* v. *Kinsey*. Since the railroad company's title to the lands east of Owosso had never been questioned it is clear that this act was passed merely

to remove any possible doubt which might exist as to the validity of the title.

That the legislature did not intend to make a new grant is apparent from its language throughout the act. Thus section 1 ratified and confirmed the action of the board of control in conferring upon the Port Huron & Lake Michigan Railroad Company the lands granted to the State of Michigan by the act of June 3, 1856, as to all of the lands situated north and south of the railroad constructed from Port Huron to Flint and east of Flint. Section 2 ratified and confirmed the action of the governor with regard to the lands east of Flint and declared that such conveyance as to said lands "shall be deemed to be of full force and effect from the date thereof," and provided that "all deeds and conveyances heretofore executed by the Port Huron & Lake Michigan Railroad Company or by the officials or trustees of said company * * * shall be deemed to be of full force and effect from the date hereof." All of this language is appropriate if the legislature intended to ratify what had previously been done and make the title of the company to its grantees date back to May 30, 1873, the date of the governor's patent. It is entirely inappropriate if the legislature intended not merely to confirm a previous grant but to make a new one.

Another very significant provision of the act is that of section 2 vesting title to the lands east of Flint in the railroad company and its grantees "all of said lands, however, being subject to all taxes heretofore

assessed thereon." Until title to the lands granted by the act of June 3, 1856, was vested in some private person they were public lands and therefore not subject to State taxation. That the act of June 9, 1881, subjected these lands to taxes previously assessed shows conclusively that the legislature merely intended to confirm a previous grant and not to make a new one.

II.

The contract whereby the Port Huron & Lake Michigan Railroad Company agreed to carry the mails at such price as Congress might direct is not unenforcible because part of the consideration received by it for such promise was illegal.

In view of what has been said above it is indisputable that appellant's road from Port Huron to Flint is land aided, but appellant contends that the road is nevertheless relieved from the obligation to carry the mails at such price as Congress may direct, because the consideration for its promise to do so was in part illegal. This position is also untenable.

The facts alleged by the appellant to show that the consideration received by the Port Huron and Lake Michigan Railroad Company was in part illegal are that the board of control and governor of the State of Michigan attempted to confer upon the railroad company all of the lands granted by the act of June 3, 1856, to the State of Michigan in aid of the construction of a railroad from Grand Haven to Flint and thence to Port Huron, and that it was subsequently held that the State had no power to

confer upon the company the lands west of Owosso granted it by that act. These facts do not show illegality vitiating the contract. The State authorities merely attempted to do something they had no power to do and failed. That they failed was not due to any fault of theirs but was the fault of the railroad company itself. They acted in reliance upon the fraudulent representation made to them by the railroad company and believed by them to be true that it contemplated the construction of a railroad from Port Huron to Grand Haven. They were entirely innocent in the matter. Their action was not in violation of any criminal statute or even immoral or contrary to public policy. It was not even a breach of trust. It was simply ineffectual, an absolute nullity.

The railroad company had held itself out as entitled to receive a land grant. Thereupon the United States, through the State, which acted as its agent in the matter, entered into a unilateral contract with the company. In consideration for a grant of land conferred upon the company, the latter agreed to carry the mails at such price as Congress might direct. That obligation was binding upon the company so far as, and only so far as, the lands were actually granted to it. In the present instance the grant failed as to part of the lands attempted to be conveyed solely through the fault of the company itself. How can it be contended that something which the company failed to receive from the United

States through no fault of the latter was an illegal consideration moving from the latter?

Assuming for the moment that one indivisible contract was entered into whereby the railroad company, in consideration for a certain grant of public land for each mile of road constructed, agreed to carry the United States mails over its road at such price as Congress might direct, can it allege that because the agents of the Government were deceived by its fraudulent representations into attempting to make a grant which was in part beyond their power the company can repudiate its obligation to carry the mails at such price as Congress might direct over such part of its road as actually received the benefit of the grant? Such a contention has never been seriously advanced in a court of law. It is contrary to the elementary principle that where the parties to an illegal contract are not *in pari delicto* the innocent party may enforce it against the guilty one.

The Government denies, however, that the contract was indivisible. As has been previously stated the obligation of a land aided railroad to carry the mails at such price as Congress might direct exists only as to those linear portions of its road which have been constructed by the aid of a congressional land grant. *United States* v. *Alabama Great Southern Railway Company*, 142 U. S. 615. In the present case under the act of Congress of June 3, 1856, and the Michigan act of February 14, 1857, the lands granted to aid in the construction of a road from Port Huron to Grand Haven could, except as to

the first 120 sections, be disposed of only at the rate of 120 sections of land for each 20 miles of road built, if there was that much land not otherwise disposed of within the limits of the grant. As to each 20-mile section which was in fact constructed by the aid of a land grant an obligation arose on the part of the company to carry the mails at land-grant rates. As to those 20-mile sections not constructed by the aid of a land grant no such obligation arose. There was a separate consideration moving from each party and a separate contract entered into as to each 20-mile section of road constructed. In the present case the obligation to carry the mails at land-grant rates was sought to be enforced only as to the 60 miles of road actually constructed by the aid of a land grant. The fact that as to other sections of its road the company applied for a land grant and failed through its own fault to receive it does not affect its obligation to carry the mails at land-grant rates over those sections of its road actually constructed by the aid of a grant.

The appellant seeks to meet this situation by asserting that the Port Huron and Lake Michigan Railroad Company applied to the State board of control for a grant of all the lands lying along the line of the proposed route from Grand Haven to Port Huron, those to the west as well as those to the east of Flint, totaling over 36,000 acres. It would not have been willing to undertake the obligations of a land-grant road had it known that it could obtain title only to the 6,428 acres lying to the east of Flint.

It contends that for this reason the contract was indivisible and since it was illegal in part it is not enforcible as to the part which is legal. The Government has already established that there was no illegality in this contract or that if there was any illegality it was solely on the part of the railroad company. That company procured the grant to it of all the land lying along the line of the proposed road from Port Huron to Grand Haven on the express representation that it intended to complete a line from Flint to Grand Haven. It made such representations fraudulently and without any intention of building the road from Flint to Grand Haven. Since the company knew that it was not entitled to the lands west of Flint, neither it nor its successors in interest can set up that it would not have incurred the obligations of a land-grant road had it known that it could receive title to those lands only which were east of Flint, and therefore the company can not set up that the contract is indivisible.

III.

The Government is not estopped by its previous treatment of the road as a nonland-grant road to now treat it as land aided.

The ground on which appellant claims that the Government is estopped to treat it as land aided is that for 40 years before the deductions involved in this suit were made the Post Office and War Departments had treated the road as a nonland-grant road. It is contended that this action on the part of the

Government was a construction of a statute by the departments of the Government charged with its execution and *United States* v. *Alabama Great Southern Railway Company*, 142 U. S. 615, is cited as showing that such a construction is binding upon the Government under the circumstances of this case.

The short answer to this contention is that there is nothing in the record to show that the treatment of the road by the Government as a nonland-grant road was based upon the construction of any statute. The findings of fact do not show that either the Post Office Department or the War Department knew prior to 1912 of any facts which would indicate to them that the road was land aided. The first departmental construction of the grant of which there is any proof is the decision of March 29, 1912, of the Comptroller of the Treasury holding that the road was a land-grant road. The conclusion that there has been long-continued departmental construction of the grant rests upon the premise that the departments concerned were aware of the grant. Not only is there no finding of facts to support that conclusion, but the Court of Claims, which had all the evidence before it, held that there had been no construction of a statute during the previous 40 years which was changed by a construction of the same statute given in 1912 and that the mistake by which the road was exempted was a mistake of fact rather than of law.

The court, furthermore, held that the Government was not estopped by the long inaction of the Post

Office Department from now treating the road as land aided. It said:

> The plaintiff was chargeable with notice of the character of the road it acquired as to its being land aided or not. In the chain of title to the properties of the Port Huron & Lake Michigan Railroad Company was the mortgage foreclosure and the fact that Bowes, the trustee to sell said lands, was made a party defendant, evidently to bring those lands under the decree of foreclosure. The public acts of the legislature referred to the lands and to the railroad company as well. The books and records of the company itself were probably open to plaintiff's inspection. But whether it had actual notice or not of the condition the fact is that said road was land aided, and the deduction that was made, it seems to us, was valid under the principles decided in *Wisconsin Central Railroad Co.* v. *United States*, 164 U. S. 190 (27 C. Cls. 440); *Chicago, St. P., M. & O. R. R. Co. case*, 217 U. S. 180.

CONCLUSION.

For the foregoing reasons the judgment of the Court of Claims was right and it should be affirmed.

Respectfully submitted.

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